

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16-CVS-15607

NORTH CAROLINA STATE
BOARD OF EDUCATION,

Plaintiff,

v.

THE STATE OF NORTH CAROLINA, and
MARK JOHNSON, in his official capacity,

Defendants.

**MEMORANDUM IN SUPPORT
OF PLAINTIFF’S MOTION
FOR SUMMARY JUDGMENT
AND MOTION FOR
PRELIMINARY INJUNCTION**

Pursuant to the Court’s March 1, 2017 case management order, the North Carolina State Board of Education respectfully submits the following brief in support of its motion for summary judgment and motion for preliminary injunction.

INTRODUCTION

This constitutional challenge asks the Court to apply a bedrock principle of constitutional law: that when a constitution expressly confers powers and duties on a specific entity, those powers and duties cannot be transferred to a different entity without a constitutional amendment.

Article IX, Section 5 of the North Carolina Constitution expressly confers certain “powers and duties” on the Board. Those constitutional powers and duties include:

- the power and duty to “supervise . . . the free public school system”;
- the power and duty to “administer the free public school system”;

- the power and duty to “supervise . . . the educational funds provided for [the free public school system’s] support”; and
- the power and duty to “administer . . . the educational funds provided for [the free public school system’s] support.”

The Board has exercised those powers and fulfilled those duties since its creation in 1868. For the first time in North Carolina history, however, the General Assembly passed legislation in December 2016 that attempted to transfer the Board’s constitutional powers and duties to a single individual: the Superintendent of Public Instruction (“SPI”).

Without an opportunity for input from the Board, the education community, or the public, the General Assembly introduced this legislation (hereinafter “the Transfer Legislation”) in a special legislative session intended to address disaster relief.¹ Less than 48 hours after the Transfer Legislation was first introduced, it passed both the House and the Senate. Three days later, it was signed into law.

The constitutional flaw in the Transfer Legislation was obvious on its face: The General Assembly essentially copied and pasted the text of the North Carolina Constitution into the Transfer Legislation, then replaced the words “State Board of Education” with “Superintendent of Public Instruction.”

The following comparison illustrates this copying and pasting:

¹ For the Court’s convenience, a copy of the Transfer Legislation is attached as Exhibit A.

Article IX, Section 5 of the North Carolina Constitution	The Transfer Legislation (N.C. Sess. Law 2016-126 § 4)
It shall be the “duty” of “ <i>the State Board of Education</i> . . . [to] supervise and administer the free public school system.”	“It shall be the duty of <i>the Superintendent of Public Instruction</i> . . . to have under his or her direction and control, all matters relating to the direct supervision and administration of the public school system.”

It takes no effort to spot this constitutional flaw.

For the reasons that follow, the Board is entitled to summary judgment, as well as a preliminary injunction to enjoin the legislation while the Court considers the Board’s motion for summary judgment.

STATEMENT OF RELEVANT FACTS

For brevity, the Board incorporates by reference the verified factual allegations of the amended complaint. Am. Compl. ¶¶ 11-26. Additional facts are discussed below where relevant.

GOVERNING STANDARDS

The governing standards for each of the Board’s motions are as follows:

Motion for Summary Judgment

“In cases ‘where there is no genuine issue as to the facts, the presence of important or difficult questions of law is no barrier to the granting of summary judgment.’” *Knight Publ’g Co. v. Charlotte-Mecklenburg Hosp. Auth.*, 172 N.C. App. 486, 488, 616 S.E.2d 602, 604 (2005) (quoting *Kessing v. Nat’l Mortg. Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971)).

“The purpose of a summary judgment motion is to eliminate a trial when, based on the pleadings and supporting materials, the trial court determines that only questions of law, not fact, are at issue.” *Loy v. Lorm Corp.*, 52 N.C. App. 428, 437, 278 S.E.2d 897, 903 (1981); *Kessing*, 278 N.C. at 534, 180 S.E.2d at 830.

Motion for Preliminary Injunction

A plaintiff is entitled to a preliminary injunction if it is: (1) “able to show likelihood of success on the merits of his case”; and (2) “likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff’s rights during the course of litigation.” *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983) (quoting *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)).

A preliminary injunction “is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities.” *Id.* at 400, 302 S.E.2d at 759 (quoting *State ex rel. Edmisten v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 357-58, 261 S.E.2d 908, 913, *appeal dismissed*, 449 U.S. 807 (1980)). Its purpose is to “preserve the status quo pending trial on the merits.” *Fayetteville St. Christian Sch.*, 299 N.C. at 357-58, 261 S.E.2d at 913.

When, as in this case, the “principal relief sought is a permanent injunction,” North Carolina courts “have consistently adhered to the proposition” that “it is particularly necessary that the preliminary injunction issue.” *North Carolina Elec. Membership Corp. v. North Carolina Dep’t of Econ. & Cmty. Dev.*, 108 N.C. App.

711, 721, 425 S.E.2d 440, 446 (1993) (quoting *McClure*, 308 N.C. at 408, 302 S.E.2d at 763).

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY JUDGMENT.

A. Constitutional powers cannot be transferred by statute.

It is a bedrock principle of constitutional law that when a constitution expressly confers certain powers and duties on an entity, those powers and duties cannot be transferred to a different entity without a constitutional amendment. *See, e.g., Guthrie v. Taylor*, 279 N.C. 703, 712-13, 185 S.E.2d 193, 200 (1971) (explaining that Article IX, Section 5 is “a direct delegation by the people, themselves, in the Constitution of the State, of [a] portion of their power,” and, therefore, “we look only to the Constitution to determine what power has been delegated”); *State v. Camacho*, 329 N.C. 589, 597, 406 S.E.2d 868, 871 (1991) (holding that when the North Carolina Constitution expressly confers powers and duties on a constitutional officer, any “encroachment” by the other branches “invade[s] the province of an independent constitutional officer” and violates the North Carolina Constitution); 1995 Op. N.C. Att’y Gen. 32 at 5 (quoting Thomas M. Cooley, *A Treatise on Constitutional Limitations* 215 (8th ed. 1927) (“[I]f powers are specifically conferred by the constitution upon [a] specified officer [or authority], the legislature cannot require or authorize [those powers] to be performed by any other officer or authority.”); Patrick C. McGinley, *Separation of Powers, State Constitutions & the Attorney General: Who Represents the State?*, 99 W. VA. L. REV. 721, 760 (1997) (stating the “fundamental proposition that when a state

constitution creates a constitutional office, the legislature may not by mere statute alter the core functions of that office”); Thomas M. Cooley, *A Treatise on Constitutional Limitations* 136 (5th ed. 1883) (stating that when “powers . . . are specially conferred by the constitution upon . . . [a] specified officer, the legislature cannot require or authorize [those powers] to be performed by any other officer or authority”).

Indeed, “[t]his is certainly not a novel concept. That the legislature may not alter a constitutional structure absent a constitutional amendment is so well established in state and federal constitutional law as to be axiomatic.” McGinley, 99 W. VA. L. REV. at 760 (collecting cases).

In short, the law that governs this case is straightforward. Simply put, constitutional powers and duties cannot be transferred by statute.

B. The Transfer Legislation attempts to strip the Board of its constitutional powers and duties.

The Board’s 148-year history of managing North Carolina’s public school system is essential to an understanding of the constitutional issue before the Court.

In 1868, the North Carolina Constitution proclaimed that “[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.” 1868 N.C. Const. art. I, § 15. These words have remained unchanged in the North Carolina Constitution since 1868, and they are unique to North Carolina. No other state constitution includes these words or includes any right to education in its citizens’ bill of rights.

To ensure that the State lived up to this promise to “guard and maintain” the right to public education, the people of North Carolina in their 1868 Constitution established the public school system and created the Board.

Article IX, Section 2 of the 1868 Constitution required the General Assembly to “provide by taxation and otherwise for a general and uniform system of Public Schools, wherein tuition shall be free of charge to all the children of the State.”² In turn, Article IX, Section 7 conferred broad, sweeping power on a State Board of Education composed of “[t]he Governor, Lieutenant Governor, Secretary of State, Treasurer, Auditor, Superintendent of Public Works, Superintendent of Public Instruction and Attorney General.” Under Article IX, Section 9, the people conferred on the Board the “full power to legislate and make all needful rules and regulations in relation to Free Public Schools, and the Educational Fund of the State.”

In sum, the people of North Carolina in their 1868 Constitution “establishe[d] the public school system,” then required that the “General Assembly provid[e] for it” and “the State Board of Education . . . manage it.” *Lane v. Stanly*, 65 N.C. 153, 157 (1871). For the past 148 years, this constitutional structure has remained unchanged. Since 1868, the Board has supervised and administered all facets of public education in North Carolina.

Today, the North Carolina Constitution continues to confer these broad, sweeping powers and duties on the Board. The current North Carolina Constitution

² For the Court’s convenience, a copy of Article IX of the 1868 North Carolina Constitution is attached hereto as Exhibit B.

was ratified by the voters in 1971. Article IX, Section 5 of the current North Carolina Constitution³ states:

The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

That constitutional provision means exactly what it says: “The State Board of Education is in charge of the public school system.” John V. Orth and Justice Paul M. Newby, *The North Carolina State Constitution*, at 180 (2d ed. 2013).

The weight of this constitutional responsibility to the people is reflected in the Board’s composition. Under Article IX, Section 4 of the North Carolina Constitution, the Board is composed of “the Lieutenant Governor, the Treasurer, and eleven members appointed by the Governor, subject to confirmation by the General Assembly in joint session.” Article IX, Section 4 requires that these Board members serve “overlapping terms of eight years.” These lengthy, overlapping terms ensure that the Board maintains its institutional knowledge and expertise in public education.

In addition, Article IX, Section 4 requires that eight of the Governor’s eleven appointments must be made from each of the eight educational districts. This geographic diversity ensures that the Board is representative of the people.

In stark contrast to the broad, sweeping powers and duties that the North Carolina Constitution confers on the Board, the North Carolina Constitution has

³ For the Court’s convenience, a copy of Article IX of the 1971 North Carolina Constitution is attached hereto as Exhibit C.

always confined the SPI to a limited role. Article IX, Section 8 of the 1868 Constitution established the SPI as a member “*of the Board*” who served as the Board’s “Secretary.” 1868 N.C. Const. art. IX, § 8 (emphasis added). Today, Article IX, Section 4 of the North Carolina Constitution clarifies that the SPI is not even a voting member of the Board, and serves only as the “secretary and chief administrative officer *of the State Board of Education.*” N.C. Const. art. IX, § 4(2) (emphasis added).

Despite this clear delineation, however, the Transfer Legislation attempts to flip flop the Board’s and the SPI’s constitutionally mandated roles. As described in the amended complaint, the Transfer Legislation does so in two ways:

First, the Transfer Legislation attempts to transfer the powers and duties of the Board to supervise and administer the public schools. Am. Compl. ¶¶ 25(a)-(b). Most notably, Section 4 of the Transfer Legislation states: “It shall be the duty of the Superintendent of Public Instruction . . . to have under his or her direction and control, all matters relating to the direct supervision and administration of the public school system.” N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(a)(5)). Thus, the Transfer Legislation attempts to transfer to the SPI the same powers and duties that the people expressly conferred on the Board in their Constitution.

Second, the Transfer Legislation attempts to transfer the powers and duties of the Board to supervise and administer the educational funds provided for the public school system’s support. Am. Compl. ¶¶ 25(c)-(d). Most notably, the

Transfer Legislation states that “it shall be the duty of the Superintendent of Public Instruction to . . . administer funds appropriated for the operations of the State Board of Education and for aid to local school administrative units.” N.C. Sess. Law 2016-126 § 4 (amending N.C. Gen. Stat. § 115C-21(b)(1b)). Likewise, Sections 3 and 4 state that the SPI, as the head of the Department of Public Instruction, will “administer the funds appropriated for [the Department’s] operation.” *Id.* § 3 (amending N.C. Gen. Stat. § 115C-19); *id.* § 4 (amending N.C. Gen. Stat. § 115C-21(a)(1)). Thus, the Transfer Legislation attempts to transfer to the SPI the same powers and duties that the people expressly conferred on the Board in their Constitution.

These constitutional conflicts are readily apparent. As described above, the General Assembly essentially copied and pasted the constitutional text into the Transfer Legislation, then replaced the words “State Board of Education” with “Superintendent of Public Instruction.” *See supra* at 3.

As the Court noted at the TRO hearing, this obvious constitutional flaw makes this case “straightforward.” Exhibit D, Transcript of TRO Hearing at 6. After all, “[i]f there is a conflict between a statute and the Constitution, [the] Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation.” *City of Asheville v. North Carolina*, No. 391PA15, 794 S.E.2d 759, 766 (N.C. Dec. 21, 2016). That is the narrow, straightforward relief the Board seeks here.

For these reasons, the Board is entitled to summary judgment.

C. The phrase “subject to laws enacted by the General Assembly” in Article IX, Section 5 does not permit the Board’s constitutional powers and duties to be stripped away.

At the TRO hearing, the State initially suggested that the phrase “subject to laws enacted by the General Assembly” in Article IX, Section 5 is a “catchall” that allows the General Assembly to do anything it wants—including stripping the Board of its constitutional powers and duties altogether and transferring them to the SPI. Ex. D at 25.

Later in the hearing, however, the State conceded this issue:

[THE COURT]: Can the General Assembly enact laws that are contrary to the language of the constitution?

[THE STATE’S COUNSEL]: I do not believe they can, your Honor. Well, they can enact laws, but they can be stricken.

[THE COURT]: I don’t think they can either. It seems to me that this Article suggests that the Board shall administer and supervise and shall make rules and regulations consistent with their mandate under the constitution, which would be subject to the laws of the General Assembly, but the General Assembly cannot take away their constitutional mandates.

[THE STATE’S COUNSEL]: I do not believe the General Assembly can do that.

Id.

For purposes of summary judgment, that concession is fatal.

Moreover, the State was correct to concede this issue. For at least two distinct reasons, Article IX, Section 5 does not give the General Assembly the prerogative to strip the Board of its constitutional powers and duties and give them to someone else.

First and foremost, the State’s requested interpretation of Article IX, Section 5 must be rejected because it has no limiting principle. If the State’s requested interpretation were correct, the General Assembly could decide that North Carolina’s public school system would be supervised and administered by any government official or entity of its choice—even private entities or individuals.

Nevertheless, the SPI has suggested that he is an appropriate recipient of the Board’s constitutional powers and duties because he is a constitutional officer who is elected statewide. That logic is flawed. There are a number of constitutional officers who are elected statewide—for example, the Commissioner of Agriculture, the Commissioner of Labor, and the Commissioner of Insurance. By the SPI’s logic, the State’s requested interpretation would allow the General Assembly to decide that North Carolina’s public school system should be supervised and administered by any one of these individuals.

For precisely that reason, state supreme courts that have considered similar state constitutional language—for example, “subject to laws” or “as prescribed by law”—have “uniformly denounced” the argument that the State makes here. *Hudson v. Kelly*, 263 P.2d 362, 368 (Ariz. 1953) (holding that legislature could not reduce constitutional office to an empty shell, and noting further that similar efforts had “uniformly been denounced by courts of last resort”); *see also, e.g., State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777, 782 (Minn. 1986) (holding that legislature’s power to modify duties of executive officials was inherently limited and could not deprive an office of all of its basic functions); *Am. Legion Post No. 279 v. Barrett*, 20

N.E.2d 45, 51 (Ill. 1939) (holding that constitutional provision requiring State Treasurer to perform “such duties as may be required by law” implied that the office had certain duties which could not be allocated elsewhere); *Ex parte Corliss*, 114 N.W. 962, 965 (N.D. 1907) (holding that the legislature’s power to prescribe duties for officers did not mean that it had the power to transfer their inherent duties to other officers); *Fant v. Gibbs*, 54 Miss. 396, 409 (Miss. 1877) (holding that legislature’s constitutional right to prescribe the duties and functions of district attorneys incorporated “implied prohibition of the power to deprive them of all duties”); *Love v. Baehr*, 47 Cal. 364, 367 (Cal. 1874) (observing that there are inherent limits on the legislature’s ability to delineate the “necessarily implied” duties and powers of a constitutional officer).

There is a good reason why courts across the country have all safeguarded their state constitutions against the kind of statutory circumvention the State is attempting here: “If . . . constitutional offices can be stripped of a *portion* of the inherent functions thereof, they can be stripped of *all* such functions . . . and the will of the framers of the constitution thereby thwarted.” *State ex rel. Banks v. Drummond*, 385 P.3d 769, 781-82 (Wash. 2016) (en banc) (emphasis added); *see also, e.g., Love*, 47 Cal. at 366 (observing that legislature’s discretion to define constitutional officers’ duties was obviously not unlimited, or it could compel the Treasurer to become a prison warden, the Controller to become a librarian, the Attorney General to become the head of mental health facilities, and the Secretary of State to become the manager of state hospitals); *Corliss*, 114 N.W. at 965

(observing that if legislature could assign duties from County Sheriff and State's Attorney to another entity, nothing could stop it from creating its own Governor or Attorney General).

For this reason alone, the State's argument fails.

The State's requested interpretation of Article IX, Section 5 is also flawed for another reason: It would violate the first and most basic rule of constitutional construction, which requires giving effect to each and every word of the text. *See Town of Boone v. State*, No. 93A15-2, 794 S.E.2d 710, 715 (N.C. Dec. 21, 2016) ("Each word informs a proper understanding of the whole."). This rule requires the Court to "lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory." *Bd. of Educ. v. Bd. of Comm'rs*, 137 N.C. 310, 312, 49 S.E. 353, 354 (1904) (quoting Thomas M. Cooley, *Cooley's Constitutional Limitations* 92 (7th ed. 1903)); *see also, e.g., Lacy v. Fid. Bank of Durham*, 183 N.C. 373, 380, 111 S.E. 612, 615 (1922) (stating that the constitution should be "construed so as to allow significance to each and every part of it if this can be done by any fair and reasonable intendment").

Here, if "subject to laws enacted by the General Assembly" means that the General Assembly can strip the Board of its constitutional powers and duties, it

would reduce 28 words in the constitutional text to mere surplusage.⁴ Under the State’s requested interpretation, the Transfer Legislation would rewrite Article IX, Section 5 to read as follows:

The State Board of Education ~~shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and~~ shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

N.C. Const. art. IX, § 5 (striketthrough added).

The 28 words stricken above were carefully chosen by the framers and ratified by the people of North Carolina. Their obvious intent was to confer specific powers and duties on the Board. Thus, to render those 28 words meaningless would violate the first and most basic rule of constitutional construction.

In sum, the phrase “subject to laws enacted by the General Assembly” does not permit the General Assembly to rewrite the North Carolina Constitution by stripping the Board of its constitutional powers and duties and transferring those

⁴ Notably, the State admitted that the Transfer Legislation seeks to reduce the Board to a shell entity that merely makes rules and regulations, instead of one that supervises and administers the public schools, as Article IX, Section 5 requires:

[THE COURT]: So that’s what it means when the Constitution says, “It shall be the duty of the State Board of Education to supervise and administer the free public school system?” Is that what that means? The Board will now make rules and regulations?

[THE STATE’S COUNSEL]: That’s [what] the [Transfer Legislation] says. Its plain meaning is that they make the rules and regulations.

Ex. D at 29.

powers and duties to anyone it desires. For that reason, the State's only defense is without merit.

II. THE BOARD IS ENTITLED TO A PRELIMINARY INJUNCTION WHILE THE COURT CONSIDERS THE BOARD'S MOTION FOR SUMMARY JUDGMENT.

A. The Board is likely to succeed on the merits.

As described above, the Board is entitled to summary judgment. *See supra* at 5-16. For the same reasons, the Board has satisfied the first requirement for a preliminary injunction: a likelihood of success on the merits. *McClure*, 308 N.C. at 401, 302 S.E.2d at 759.

Therefore, for purposes of the Board's motion for preliminary injunction, the only remaining questions before the Court are: (1) whether the Board has shown irreparable harm; and (2) whether the balancing of equities favors the Board. *Id.*

B. The Board has shown irreparable harm as a matter of law.

As the Court correctly noted in its temporary restraining order, constitutional violations amount to *per se* irreparable harm as a matter of law. Exhibit E, Temporary Restraining Order at 2; *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 653, 142 S.E.2d 697, 700 (1965); *Kaplan v. Prolife Action League*, 111 N.C. App. 1, 15, 431 S.E.2d 828, 834 (1993). Thus, in a constitutional challenge like this one, the irreparable-harm analysis simply collapses into a merits analysis. *See, e.g., Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 520-21 (4th Cir. 2002); *Dean v. Leake*, 550 F. Supp. 2d 594, 602 (E.D.N.C. 2008).

Here, as described above, the Board is likely to succeed on the merits of its claims that the Transfer Legislation is unconstitutional. Thus, as the Court correctly concluded in its TRO, no further showing of irreparable harm is required. Ex. E at 2.

Even without this *per se* irreparable harm, however, the Board would still be entitled to a preliminary injunction to preserve the status quo for the public school system's 1.5 million students. As described in the affidavit of the Board's Chairman, William W. Cobey, Jr., without a preliminary injunction to preserve the status quo, the Transfer Legislation would reduce a 148-year-old constitutional entity to an empty shell, and would move the entire \$10 billion public school system under the control of a single individual for the first time in North Carolina's history. Exhibit F, Cobey Aff. ¶ 9. What is more, in the absence of a preliminary injunction, this dismantling of the Board's constitutional powers and duties would occur instantly. *Id.*

In addition, without a preliminary injunction to preserve the status quo, the SPI would be immediately empowered to take drastic actions that could not be undone. For example, the SPI would immediately be empowered to unilaterally hire and fire the State's public school system employees, fire members of the Board's staff, determine whether certain state public school system positions should be exempt from state personnel laws, execute new statewide contracts for the public school system, and jeopardize the Board's ability to manage more than 150 existing

contracts involving tens of millions of dollars. Ex. F ¶ 10. These actions would be impossible to undo after the fact. *Id.*

Simply put, without a preliminary injunction to preserve the status quo, it would be impossible for the Board to “unring the bell.” This feature of the case, by itself, warrants a preliminary injunction.

C. A balancing of the equities counsels in favor of a preliminary injunction.

In addition to the two preliminary-injunction elements described above, the Court must perform “a careful balancing of the equities.” *McClure*, 308 N.C. at 400, 302 S.E.2d at 759 (quoting *Berry*, 293 N.C. at 701, 239 S.E.2d at 574). Notably, the State has conceded this issue:

[THE COURT]: And that [would be] a fairly easy balancing test, wouldn't it? A theoretical harm to the State and a real, practical harm to an agency that's constitutionally mandated to care for the public school children of the state.

[THE STATE'S COUNSEL]: Yes, sir.

Ex. D at 34.

The State was correct to concede this issue. As described above, the Transfer Legislation will cause *per se* irreparable harm unless it is preliminarily enjoined. Moreover, as described above, the Transfer Legislation would dismantle a constitutional entity that has been in charge of public education for 148 years, and instead, empower a single individual to take charge of public education—immediately empowering him to take actions that could not be undone. These equities counsel strongly in favor of the Board.

Conversely, a preliminary injunction would not harm the State at all. The Board has exercised its constitutional powers and fulfilled its constitutional duties for nearly a century and a half. Surely the State could not be harmed by maintaining this longstanding status quo during the relatively short time it will take this case to make its way through the courts.

Finally, the State lacks a non-political justification for the Transfer Legislation.⁵ Ex. F. ¶ 11. This makes balancing the equities simple. Again, Article I, Section 15 of the North Carolina Constitution declares that “[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.” N.C. Const. art. I, § 15. As Chairman Cobey’s affidavit notes, “guarding and maintaining that right should always be above politics.” Ex. F ¶ 11.

For these reasons, a balancing of the equities weighs in favor of a preliminary injunction.

CONCLUSION

The Board respectfully requests that the Court grant its motion for summary judgment and grant its motion for a preliminary injunction to enjoin the Transfer Legislation while the Court considers the Board’s motion for summary judgment.

⁵ The TRO hearing featured the following exchange:

[THE COURT]: When did [any constitutional ambiguity] arise? I wonder . . . when the ambiguity arose. Could it have been late on the evening of November the 8th or 9th [Election Night 2016] or something like that? Is that when the ambiguity arose?

[THE STATE’S COUNSEL]: It’s possible, Your Honor.

Ex. D at 15.

Respectfully submitted the 12th day of April, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served by e-mail and hand delivery prior to 5:00 p.m. to the following:

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This the 12th day of April, 2017.



Andrew H. Erteschik

Exhibit A

**GENERAL ASSEMBLY OF NORTH CAROLINA
FOURTH EXTRA SESSION 2016**

**SESSION LAW 2016-126
HOUSE BILL 17**

AN ACT TO CLARIFY THE SUPERINTENDENT OF PUBLIC INSTRUCTION'S ROLE AS THE ADMINISTRATIVE HEAD OF THE DEPARTMENT OF PUBLIC INSTRUCTION, TO CHANGE THE APPOINTMENTS PROCESS FOR THE BOARDS OF TRUSTEES FOR THE CONSTITUENT INSTITUTIONS OF THE UNIVERSITY OF NORTH CAROLINA, TO MODIFY THE APPOINTMENT OF HEADS OF PRINCIPAL STATE DEPARTMENTS, AND TO ESTABLISH TASK FORCE FOR SAFER SCHOOLS.

The General Assembly of North Carolina enacts:

PART I. CLARIFY ROLES/DPI/SBE

SECTION 1. G.S. 115C-11 reads as rewritten:

"§ 115C-11. Organization and internal procedures of Board.

...

(a1) Student advisors. – The ~~Governor~~ Superintendent of Public Instruction is hereby authorized to appoint two high school students who are enrolled in the public schools of North Carolina as advisors to the State Board of Education. The student advisors shall participate in State Board deliberations in an advisory capacity only. The State Board may, in its discretion, exclude the student advisors from executive sessions.

~~The Governor shall make initial appointments of student advisors to the State Board as follows:~~

- (1) ~~One high school junior shall be appointed for a two year term beginning September 1, 1986, and expiring June 14, 1988; and~~
- (2) ~~One high school senior shall be appointed for a one year term beginning September 1, 1986, and expiring June 14, 1987. When an initial or subsequent term expires, the Governor~~ The Superintendent of Public Instruction shall appoint a stagger the appointments of the two student advisors so that a high school junior ~~for~~ is serving in the first year of a two-year term and a high school senior is serving in the second year of a two-year term simultaneously. The appointment of a high school junior shall be made beginning June 15 of ~~that each~~ year. If a student advisor is no longer enrolled in the public schools of North Carolina or if a vacancy otherwise occurs, the ~~Governor~~ Superintendent of Public Instruction shall appoint a student advisor for the remainder of the unexpired term.

Student advisors shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

...

(a3) Superintendent Advisor. – The ~~Governor~~ Superintendent of Public Instruction shall appoint a superintendent of a local school administrative unit as an advisor to the State Board of Education. The superintendent advisor shall serve for a term of one year. The superintendent advisor shall participate in State Board deliberations and committee meetings in an advisory



capacity only. The State Board may, in its discretion, exclude the superintendent advisor from executive sessions.

In the event that a superintendent advisor ceases to be a superintendent in a local school administrative unit, the position of superintendent advisor shall be deemed vacant. In the event that a vacancy occurs in the position for whatever reason, the ~~Governor~~ Superintendent of Public Instruction shall appoint a superintendent advisor for the remainder of the unexpired term. The superintendent advisor to the State Board shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

...
(i) Administrative Assistance. – The Superintendent of Public Instruction shall provide technical assistance and administrative assistance, including all personnel except as otherwise provided in subsection (j) of this section, to the State Board of Education through the Department of Public Instruction.

(j) Certain Personnel Appointed by the State Board. – The State Board may appoint only the following personnel positions to support the operations of the State Board of Education through the Department of Public Instruction:

	<u>Position number</u>	<u>Title</u>
(1)	<u>65023576</u>	<u>Attorney I.</u>
(2)	<u>60009384</u>	<u>Attorney II.</u>
(3)	<u>65003194</u>	<u>Paralegal II.</u>
(4)	<u>60095070</u>	<u>Administrative Assistant I."</u>

SECTION 2. G.S. 115C-12 reads as rewritten:

"§ 115C-12. Powers and duties of the Board generally.

The general supervision and administration of the free public school system shall be vested in the State Board of Education. The State Board of Education shall establish ~~policy~~ all needed rules and regulations for the system of free public schools, subject to laws enacted by the General Assembly. In accordance with Sections 7 and 8 of Article III of the North Carolina Constitution, the Superintendent of Public Instruction, as an elected officer and Council of State member, shall administer all needed rules and regulations adopted by the State Board of Education through the Department of Public Instruction. The powers and duties of the State Board of Education are defined as follows:

...."

SECTION 3. G.S. 115C-19 reads as rewritten:

"§ 115C-19. Chief administrative officer of the State Board of Education.

As provided in Article IX, Sec. 4(2) of the North Carolina Constitution, the Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education. ~~As secretary and chief administrative officer of the State Board of Education, the Superintendent manages on a day to day basis the administration of the free public school system, subject to the direction, control, and approval of the State Board. Subject to the direction, control, and approval of the State Board of Education, the Superintendent of Public Instruction~~ As provided in Sections 7 and 8 of Article III of the North Carolina Constitution, the Superintendent of Public Instruction shall be an elected officer and Council of State member and shall carry out the duties prescribed under G.S. 115C-21. G.S. 115C-21 as the administrative head of the Department of Public Instruction. The Superintendent of Public Instruction shall administer all needed rules and regulations adopted by the State Board of Education through the Department of Public Instruction."

SECTION 4. G.S. 115C-21 reads as rewritten:

"§ 115C-21. Powers and duties generally.

(a) Administrative Duties. – ~~Subject to the direction, control, and approval of the State Board of Education, it~~ It shall be the duty of the Superintendent of Public Instruction:

- (1) To organize and establish a Department of Public Instruction which shall include ~~such~~ divisions and departments as ~~the State Board considers necessary~~ for supervision and administration of the public school ~~system~~, to administer the funds appropriated for the operation of the Department of Public Instruction, in accordance with all needed rules and regulations adopted by the State Board of Education, and to enter into contracts for the operations of the Department of Public Instruction. All appointments of administrative and supervisory personnel to the staff of the Department of Public Instruction ~~are subject to the approval of the State Board of Education, which~~ Instruction and the State Board of Education, except for certain personnel appointed by the State Board of Education as provided in G.S. 115C-11(j), shall be under the control and management of the Superintendent of Public Instruction who may terminate these appointments ~~for cause~~ in conformity with Chapter 126 of the General Statutes, the North Carolina Human Resources Act.
 - (2) To keep the public informed as to the problems and needs of the public schools by constant contact with all school administrators and teachers, by personal appearance at public gatherings, and by information furnished to the press of the State.
 - (3) To report biennially to the Governor 30 days prior to each regular session of the General Assembly, such report to include information and statistics of the public schools, with recommendations for their improvement and for changes in the school law.
 - (4) To have printed and distributed such educational bulletins as are necessary for the professional improvement of teachers and for the cultivation of public sentiment for public education, and to have printed all forms necessary and proper for the administration of the Department of Public Instruction.
 - (5) To ~~manage~~ have under his or her direction and control, all ~~those~~ matters relating to the direct supervision and administration of the public school system that the State Board delegates to the Superintendent of Public Instruction.
 - (6) To create ~~and administer~~ special ~~fund~~ funds within the Department of Public Instruction to manage funds received as grants from nongovernmental sources in support of public education. ~~Effective July 1, 1995, this special fund is transferred to the State Board of Education and shall be administered by the State Board~~ education in accordance with G.S. 115C-410.
 - (7) Repealed by Session Laws 1995, c. 72, s. 2.
 - (8) To administer, through the Department of Public Instruction, all needed rules and regulations established by the State Board of Education.
 - (9) To have under his or her direction and control all matters relating to the provision of staff services, except certain personnel appointed by the State Board as provided in G.S. 115C-11(j), and support of the State Board of Education, including implementation of federal programs on behalf of the State Board.
- (b) Duties as Secretary to the State Board of Education. – ~~Subject to the direction, control, and approval of the State Board of Education,~~ As secretary to the State Board of Education, it shall be the duty of the Superintendent of Public Instruction:
- (1) ~~To administer through the Department of Public Instruction, the instructional policies established by the Board.~~
 - (1a) Repealed by Session Laws 1995, c. 72, s. 2.

- (1b) To administer funds appropriated for the operations of the State Board of Education and for aid to local school administrative units.
- (2) To keep the Board informed regarding developments in the field of public education.
- (3) To make recommendations to the Board with regard to the problems and needs of education in North Carolina.
- (4) To make available to the public schools a continuous program of comprehensive supervisory services.
- (5) To collect and organize information regarding the public schools, on the basis of which he or she shall furnish the Board such tabulations and reports as may be required by the Board.
- (6) To communicate to the public school administrators all information and instructions regarding ~~instructional policies and procedures~~needed rules and regulations adopted by the Board.
- (7) To have custody of the official seal of the Board and to attest all deeds, leases, or written contracts executed in the name of the Board. All deeds of conveyance, leases, and contracts affecting real estate, title to which is held by the Board, and all contracts of the Board required to be in writing and under seal, shall be executed in the name of the Board by the chairman and attested by the secretary; and proof of the execution, if required or desired, may be had as provided by law for the proof of corporate instruments.
- (8) To attend all meetings of the Board and to keep the minutes of the proceedings of the Board in a well-bound and suitable book, which minutes shall be approved by the Board prior to its adjournment; and, as soon thereafter as possible, to furnish to each member of the Board a copy of said minutes.
- (9) To perform such other duties as may be necessary and appropriate for the Superintendent of Public Instruction in the role as secretary to the Board ~~may assign to him from time to time.~~Board."

SECTION 5. G.S. 115C-408(a) reads as rewritten:

"(a) It is the policy of the State of North Carolina to create a public school system that graduates good citizens with the skills demanded in the marketplace, and the skills necessary to cope with contemporary society, using State, local and other funds in the most cost-effective manner. The Board shall have general supervision and administration of the educational funds provided by the State and federal governments, except those mentioned in Section 7 of Article IX of the State Constitution, and also excepting such local funds as may be provided by a county, city, or district. The Superintendent of Public Instruction shall administer any available educational funds through the Department of Public Instruction in accordance with all needed rules and regulations adopted by the State Board of Education."

SECTION 6. G.S. 115C-410 reads as rewritten:

"§ 115C-410. Power to accept gifts and grants.

The Board is authorized to adopt all needed rules and regulations related to the creation and administration of special funds within the Department of Public Instruction to manage any funds received as grants from nongovernmental sources in support of public education. In accordance with the State Board's rules and regulations, the Superintendent of Public Instruction is authorized to create and administer such special funds and to accept, receive, use, or reallocate to local school administrative units any gifts, donations, grants, devises, or other forms of voluntary contributions."

SECTION 7. G.S. 126-5(d) reads as rewritten:

- "(d) (1) Exempt Positions in Cabinet Department. – Subject to the provisions of this Chapter, which is known as the North Carolina Human Resources Act, the

Governor may designate a total of ~~4,500~~425 exempt positions throughout the following departments and offices:

- a. Department of Administration.
- b. Department of Commerce.
- c. Repealed by Session Laws 2012-83, s. 7, effective June 26, 2012, and by Session Laws 2012-142, s. 25.2E(a), effective January 1, 2013.
- d. Department of Public Safety.
- e. Department of Natural and Cultural Resources.
- f. Department of Health and Human Services.
- g. Department of Environmental Quality.
- h. Department of Revenue.
- i. Department of Transportation.
- j. Repealed by Session Laws 2012-83, s. 7, effective June 26, 2012, and by Session Laws 2012-142, s. 25.2E(a), effective January 1, 2013.
- k. Department of Information Technology.
- ~~l. Office of State Budget and Management.~~
- ~~m. Office of State Human Resources.~~
- n. Department of Military and Veterans Affairs.

- (2) Exempt Positions in Council of State Departments and Offices. – The Secretary of State, the Auditor, the Treasurer, the Attorney General, the Commissioner of Agriculture, the Commissioner of Insurance, and the Labor Commissioner may designate exempt positions. The State Board of Education may designate exempt positions in the Department of Public Instruction. The number of exempt policymaking positions in each department headed by an elected department head listed above in this ~~sub-subdivision~~sub-subdivision, other than the Department of Public Instruction, shall be limited to ~~20-25~~ exempt policymaking positions or ~~one~~ two percent ~~(1%)(2%)~~ of the total number of full-time positions in the department, whichever is greater. The number of exempt managerial positions shall be limited to ~~20-25~~ positions or ~~one~~ two percent ~~(1%)(2%)~~ of the total number of full-time positions in the department, whichever is greater. The number of exempt policymaking positions designated by the State Board of Education shall be limited to 70 exempt policymaking positions or two percent (2%) of the total number of full-time positions in the department, whichever is greater. The number of exempt managerial positions designated by the State Board of Education shall be limited to 70 exempt managerial positions or two percent (2%) of the total number of full-time positions in the department, whichever is greater.

...

- (2c) Changes in Cabinet Department Exempt Position Designation. – If the status of a position designated exempt pursuant to subsection (d)(1) of this section is changed and the position is made subject to the provisions of this Chapter, an employee occupying the position who has been continuously employed in a permanent position for the immediate 12 preceding months, shall be deemed a career State employee as defined by G.S. 126-1.1(a) upon the effective date of the change in designation.

...."

SECTION 8. G.S. 126-5(d), as amended by Section 7 of this act, reads as rewritten:

- "(d) (1) Exempt Positions in Cabinet Department. – Subject to the provisions of this Chapter, which is known as the North Carolina Human Resources Act, the Governor may designate a total of 425 exempt positions throughout the following departments and offices:
- a. Department of Administration.
 - b. Department of Commerce.
 - c. Repealed by Session Laws 2012-83, s. 7, effective June 26, 2012, and by Session Laws 2012-142, s. 25.2E(a), effective January 1, 2013.
 - d. Department of Public Safety.
 - e. Department of Natural and Cultural Resources.
 - f. Department of Health and Human Services.
 - g. Department of Environmental Quality.
 - h. Department of Revenue.
 - i. Department of Transportation.
 - j. Repealed by Session Laws 2012-83, s. 7, effective June 26, 2012, and by Session Laws 2012-142, s. 25.2E(a), effective January 1, 2013.
 - k. Department of Information Technology.
 - l. Repealed.
 - m. Repealed.
 - n. Department of Military and Veterans Affairs.
- (2) Exempt Positions in Council of State Departments and Offices. – The Secretary of State, the Auditor, the Treasurer, the Attorney General, the Superintendent of Public Instruction, the Commissioner of Agriculture, the Commissioner of Insurance, and the Labor Commissioner may designate exempt positions. ~~The State Board of Education may designate exempt positions in the Department of Public Instruction.~~ The number of exempt policymaking positions in each department headed by an elected department head listed above in this sub-subdivision, ~~other than the Department of Public Instruction, sub-subdivision~~ shall be limited to 25 exempt policymaking positions or two percent (2%) of the total number of full-time positions in the department, whichever is greater. The number of exempt managerial positions shall be limited to 25 positions or two percent (2%) of the total number of full-time positions in the department, whichever is greater. The number of exempt policymaking positions designated by the ~~State Board of Education~~ Superintendent of Public Instruction shall be limited to 70 exempt policymaking positions or two percent (2%) of the total number of full-time positions in the department, whichever is greater. The number of exempt managerial positions designated by the ~~State Board of Education~~ Superintendent of Public Instruction shall be limited to 70 exempt managerial positions or two percent (2%) of the total number of full-time positions in the department, whichever is greater.
- (2a) Designation of Additional Positions. – ~~The Governor, Governor or~~ Governor or elected department head, ~~or State Board of Education head~~ may request that additional positions be designated as exempt. The request shall be made by sending a list of exempt positions that exceed the limit imposed by this subsection to the Speaker of the North Carolina House of Representatives and the President of the North Carolina Senate. A copy of the list also shall be sent to the Director of the Office of State Human Resources. The General Assembly may authorize all, or part of, the additional positions to be

designated as exempt positions. If the General Assembly is in session when the list is submitted and does not act within 30 days after the list is submitted, the list shall be deemed approved by the General Assembly, and the positions shall be designated as exempt positions. If the General Assembly is not in session when the list is submitted, the 30-day period shall not begin to run until the next date that the General Assembly convenes or reconvenes, other than for a special session called for a specific purpose not involving the approval of the list of additional positions to be designated as exempt positions; the policymaking positions shall not be designated as exempt during the interim.

- (2b) Designation of Liaison Positions. – Liaisons to the Collaboration for Prosperity Zones set out in G.S. 143B-28.1 for the Departments of Commerce, Environmental Quality, and Transportation are designated as exempt.
- (2c) Changes in Cabinet Department Exempt Position Designation. – If the status of a position designated exempt pursuant to subsection (d)(1) of this section is changed and the position is made subject to the provisions of this Chapter, an employee occupying the position who has been continuously employed in a permanent position for the immediate 12 preceding months, shall be deemed a career State employee as defined by G.S. 126-1.1(a) upon the effective date of the change in designation.
- (3) Letter. – These positions shall be designated in a letter to the Director of the Office of State Human Resources, the Speaker of the House of Representatives, and the President of the Senate by July 1 of the year in which the oath of office is administered to each Governor unless the provisions of subsection (d)(4) apply.
- (4) Vacancies. – In the event of a vacancy in the Office of Governor or in the office of a member of the Council of State, the person who succeeds to or is appointed or elected to fill the unexpired term shall make such designations in a letter to the Director of the Office of State Human Resources, the Speaker of the House of Representatives, and the President of the Senate within 180 days after the oath of office is administered to that person. ~~In the event of a vacancy in the Office of Governor, the State Board of Education shall make these designations in a letter to the Director of the Office of State Human Resources, the Speaker of the House of Representatives, and the President of the Senate within 180 days after the oath of office is administered to the Governor.~~
- (5) Creation, Transfer, or Reorganization. – ~~The Governor, Governor or~~ elected department head, ~~or State Board of Education head~~ may designate as exempt a position that is created or transferred to a different department, or is located in a department in which reorganization has occurred, after October 1 of the year in which the oath of office is administered to the Governor. The designation must be made in a letter to the Director of the Office of State Human Resources, the Speaker of the North Carolina House of Representatives, and the President of the North Carolina Senate within 180 days after such position is created, transferred, or in which reorganization has occurred.
- (6) Reversal. – Subsequent to the designation of a position as an exempt position as hereinabove provided, the status of the position may be reversed and made subject to the provisions of this Chapter by the ~~Governor, Governor or~~ by an elected department head, ~~or by the State Board~~

~~of Education head~~ in a letter to the Director of the Office of State Human Resources, the Speaker of the North Carolina House of Representatives, and the President of the North Carolina Senate.

- (7) Hearing Officers. – Except for deputy commissioners appointed pursuant to G.S. 97-79 and as otherwise specifically provided by this section, no employee, by whatever title, whose primary duties include the power to conduct hearings, take evidence, and enter a decision based on findings of fact and conclusions of law based on statutes and legal precedents shall be designated as exempt. This subdivision shall apply beginning July 1, 1985, and no list submitted after that date shall designate as exempt any employee described in this subdivision."

SECTION 9. G.S. 143-745(a)(1) reads as rewritten:

- "(1) "Agency head" means the Governor, a Council of State member, a cabinet secretary, the President of The University of North Carolina, the President of the Community College System, the State Controller, and other independent appointed officers with authority over a State agency. ~~The agency head for the Department of Public Instruction shall be the State Board of Education.~~"

SECTION 10. G.S. 143A-44.1 reads as rewritten:

"§ 143A-44.1. Creation.

There is hereby created a Department of Public Instruction. The head of the Department of Public Instruction is the ~~State Board of Education. Any provision of G.S. 143A-9 to the contrary notwithstanding, the appointment of the State Board of Education shall be as prescribed in Article IX, Section (4)(1) of the Constitution.~~Superintendent of Public Instruction."

SECTION 11. G.S. 143A-44.2 is repealed.

SECTION 12. G.S. 143A-44.3 reads as rewritten:

"§ 143A-44.3. Superintendent of Public Instruction; creation; transfer of powers and duties.

The office of the Superintendent of Public Instruction, as provided for by Article III, Section 7 of the Constitution, and the Department of Public Instruction are transferred to the Department of Public Instruction. The Superintendent of Public Instruction shall be the Secretary and Chief Administrative Officer of the State Board of Education, and shall have all powers and duties conferred by this Chapter and the Constitution, delegated to him or her by the Governor and by the State Board of Education, and conferred by Chapter 115C of the General Statutes, Statutes and the laws of this State."

SECTION 13. G.S. 14-234(d6) is repealed.

SECTION 14. G.S. 115C-75.5(4) reads as rewritten:

- "(4) ASD Superintendent. – The superintendent of the ASD appointed by the ~~State Board of Education~~Superintendent of Public Instruction in accordance with G.S. 115C-75.6(b)."

SECTION 15. G.S. 115C-75.6 reads as rewritten:

"§ 115C-75.6. Achievement School District.

(a) There is established the Achievement School District (ASD) under the administration of the State Board of ~~Education~~Education and the Superintendent of Public Instruction. The ASD shall assume the supervision, management, and operation of elementary schools that have been selected as achievement schools pursuant to this Article.

(b) ~~An ASD Superintendent Selection Advisory Committee shall be established to make a recommendation to the State Board of Education on appointment of a superintendent to serve as the executive officer of the ASD. The Committee shall ensure that the individual recommended has qualifications consistent with G.S. 115C-271(a). The Lieutenant Governor shall serve as chair of the Committee and shall appoint the following additional members:~~

- (1) ~~Three members of the State Board of Education.~~
- (2) ~~One teacher or retired teacher.~~
- (3) ~~One principal or retired principal.~~
- (4) ~~One superintendent or retired superintendent.~~
- (5) ~~One parent of a student currently enrolled in a low performing school, as defined in G.S. 115C-105.37.~~

(c) ~~The State Board of Education shall consider the recommendation of the ASD Superintendent Selection Advisory Committee and Superintendent of Public Instruction shall~~ appoint a superintendent to serve as the executive officer of the ASD. The ASD Superintendent shall serve at the pleasure of the ~~State Board of Education~~Superintendent of Public Instruction at a salary established by the ~~State Board of Education~~Superintendent of Public Instruction within the funds appropriated for this purpose. The ASD Superintendent shall have qualifications consistent with G.S. 115C-271(a) and report directly to the ~~State Board of Education~~Superintendent of Public Instruction.

(d) By January 15 annually, the State Board of ~~Education~~Education, ~~Superintendent of Public Instruction~~, and the ASD Superintendent shall report to the Joint Legislative Education Oversight Committee on all aspects of operation of ASD, including the selection of achievement schools and their progress."

SECTION 16. G.S. 115C-150.11 reads as rewritten:

"§ 115C-150.11. State Board of Education as governing agency.

The State Board of Education shall be the sole governing agency for the Governor Morehead School for the Blind, the Eastern North Carolina School for the Deaf, and the North Carolina School for the Deaf. The ~~Department~~Superintendent of Public Instruction through the Department of Public Instruction shall be responsible for the ~~administration~~administration, including appointment of staff, and oversight of a school governed by this Article."

SECTION 17. G.S. 115C-218 reads as rewritten:

"§ 115C-218. Purpose of charter schools; establishment of North Carolina Charter Schools Advisory Board and North Carolina Office of Charter Schools.

...

(b) North Carolina Charter Schools Advisory Board. –

- (1) Advisory Board. – There is created the North Carolina Charter Schools Advisory Board, hereinafter referred to in this Article as the Advisory Board. The Advisory Board shall be located administratively within the Department of Public Instruction and shall report to the State Board of Education.
- (2) Membership. – The State Superintendent of Public Instruction, or the Superintendent's designee, shall be the secretary of the Advisory Board and a nonvoting member. ~~The Chair of the State Board of Education shall appoint a member of the State Board to serve as a nonvoting member of the Advisory Board.~~ The Advisory Board shall consist of the following 11 voting members:
 - a. ~~Three members appointed by the Governor, including the chair of the Advisory Board.~~
 - b. ~~Three~~Four members appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, in accordance with G.S. 120-121.
 - c. ~~Three~~Four members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, in accordance with G.S. 120-121.
 - d. ~~One member~~Two members appointed by the State Board of Education who ~~is~~are not a ~~current member~~members of the State

Board of Education and who ~~is~~are charter school ~~advocate~~advocates in North Carolina.

e. The Lieutenant Governor or the Lieutenant Governor's designee.

- (3) Covered board. – The Advisory Board shall be treated as a board for purposes of Chapter 138A of the General Statutes.
 - (4) Qualifications of members. – Members appointed to the Advisory Board shall collectively possess strong experience and expertise in public and nonprofit governance, management and finance, assessment, curriculum and instruction, public charter schools, and public education law. All appointed members of the Advisory Board shall have demonstrated an understanding of and a commitment to charter schools as a strategy for strengthening public education.
 - (5) Terms of office and vacancy appointments. – Appointed members shall serve four-year terms of office beginning on July 1. No appointed member shall serve more than eight consecutive years. Vacancy appointments shall be made by the appointing authority for the remainder of the term of office.
 - (6) Presiding officers and quorum. – The Advisory Board shall annually elect a chair and a vice-chair from among its membership. The chair shall preside over the Advisory Board's meetings. In the absence of the chair, the vice-chair shall preside over the Advisory Board's meetings. A majority of the Advisory Board constitutes a quorum.
 - (7) Presiding officers and quorum. – Meetings. – Meetings of the Advisory Board shall be held upon the call of the chair or the vice-chair with the approval of the chair.
 - (8) Expenses. – Members of the Advisory Board shall be reimbursed for travel and subsistence expenses at the rates allowed to State officers and employees by G.S. 138-6(a).
 - (9) Removal. – Any appointed member of the Advisory Board may be removed by a vote of at least two-thirds of the members of the Advisory Board at any duly held meeting for any cause that renders the member incapable or unfit to discharge the duties of the office.
 - (10) Powers and duties. – The Advisory Board shall have the following duties:
 - a. To make recommendations to the State Board of Education on the adoption of rules regarding all aspects of charter school operation, including time lines, standards, and criteria for acceptance and approval of applications, monitoring of charter schools, and grounds for revocation of charters.
 - b. To review applications and make recommendations to the State Board for final approval of charter applications.
 - c. To make recommendations to the State Board on actions regarding a charter school, including renewals of charters, nonrenewals of charters, and revocations of charters.
 - d. To undertake any other duties and responsibilities as assigned by the State Board.
 - (11) Duties of the chair of the Advisory Board. – In addition to any other duties prescribed in this Article, the chair of the Advisory Board, or the chair's designee, shall advocate for the recommendations of the Advisory Board at meetings of the State Board upon the request of the State Board.
- (c) North Carolina Office of Charter Schools. –
- (1) Establishment of the North Carolina Office of Charter Schools. – There is established the North Carolina Office of Charter Schools, hereinafter

referred to in this Article as the Office of Charter Schools. The Office of Charter Schools shall be administratively located in the Department of Public Instruction, ~~subject to the supervision, direction, and control of the State Board of Education.~~Instruction. The Office of Charter Schools shall consist of an executive director appointed by the ~~State Board of Education~~Superintendent of Public Instruction and such other professional, administrative, technical, and clerical personnel as may be necessary to assist the Office of Charter Schools in carrying out its powers and duties.

- (2) Executive Director. – The Executive Director shall report to and serve at the pleasure of the ~~State Board of Education~~Superintendent of Public Instruction at a salary established by the ~~State Board~~Superintendent within the funds appropriated for this purpose. The duties of the Executive Director shall include presenting the recommendations of the Advisory Board at meetings of the State Board upon the request of the State Board.
- (3) Powers and duties. – The Office of Charter Schools shall have the following powers and duties:
 - a. Serve as staff to the Advisory Board and fulfill any task and duties assigned to it by the Advisory Board.
 - b. Provide technical assistance and guidance to charter schools operating within the State.
 - c. Provide technical assistance and guidance to nonprofit corporations seeking to operate charter schools within the State.
 - d. Provide or arrange for training for charter schools that have received preliminary approval from the State Board.
 - e. Assist approved charter schools and charter schools seeking approval from the State Board in coordinating services with the Department of Public Instruction.
 - f. Other duties as assigned by the ~~State Board~~Superintendent of Public Instruction.
- (4) Agency cooperation. – All State agencies and departments shall cooperate with the Office of Charter Schools in carrying out its powers and duties as necessary in accordance with this Article."

SECTION 18. G.S. 115C-218.20(b) reads as rewritten:

"(b) No civil liability shall attach to the State Board of Education, the Superintendent of Public Instruction, or to any of their members or employees, individually or collectively, for any acts or omissions of the charter school."

SECTION 19. G.S. 115C-238.73(g) reads as rewritten:

"(g) There shall be no liability for negligence on the part of the board of directors, or its employees, or the State Board of Education, the Superintendent of Public Instruction, or ~~its any of their members or~~ employees, individually or collectively, arising from any act taken or omission by any of them in carrying out the provisions of this section. The immunity established by this subsection shall not extend to gross negligence, wanton conduct, or intentional wrongdoing that would otherwise be actionable. The immunity established by this subsection shall be deemed to have been waived to the extent of indemnification by insurance, indemnification under Articles 31A and 31B of Chapter 143 of the General Statutes, and to the extent sovereign immunity is waived under the Tort Claims Act, as set forth in Article 31 of Chapter 143 of the General Statutes."

SECTION 20. G.S. 115C-332(g) reads as rewritten:

"(g) There shall be no liability for negligence on the part of a local board of education, or its employees, or the State Board of Education, the Superintendent of Public Instruction, or ~~its any of their members or~~ employees, individually or collectively, arising from any act taken

or omission by any of them in carrying out the provisions of this section. The immunity established by this subsection shall not extend to gross negligence, wanton conduct, or intentional wrongdoing that would otherwise be actionable. The immunity established by this subsection shall be deemed to have been waived to the extent of indemnification by insurance, indemnification under Articles 31A and 31B of Chapter 143 of the General Statutes, and to the extent sovereign immunity is waived under the Tort Claims Act, as set forth in Chapter 31 of Chapter 143 of the General Statutes."

SECTION 21. G.S. 115C-333(e) reads as rewritten:

"(e) Civil Immunity. – There shall be no liability for negligence on the part of the State Board of ~~Education~~Education, the Superintendent of Public Instruction, or a local board of education, or their members or employees, individually or collectively, arising from any action taken or omission by any of them in carrying out the provisions of this section. The immunity established by this subsection shall not extend to gross negligence, wanton conduct, or intentional wrongdoing that would otherwise be actionable. The immunity established by this subsection shall be deemed to have been waived to the extent of indemnification by insurance, indemnification under Articles 31A and 31B of Chapter 143 of the General Statutes, and to the extent sovereign immunity is waived under the Tort Claims Act, as set forth in Article 31 of Chapter 143 of the General Statutes."

SECTION 22. G.S. 115C-333.1(g) reads as rewritten:

"(g) Civil Immunity. – There shall be no liability for negligence on the part of the State Board of ~~Education~~Education, the Superintendent of Public Instruction, or a local board of education, or their members or employees, individually or collectively, arising from any action taken or omission by any of them in carrying out the provisions of this section. The immunity established by this subsection shall not extend to gross negligence, wanton conduct, or intentional wrongdoing that would otherwise be actionable. The immunity established by this subsection shall be deemed to have been waived to the extent of indemnification by insurance, indemnification under Articles 31A and 31B of Chapter 143 of the General Statutes, and to the extent sovereign immunity is waived under the Tort Claims Act, as set forth in Article 31 of Chapter 143 of the General Statutes."

SECTION 23. G.S. 115C-390.3(c) reads as rewritten:

"(c) Notwithstanding any other law, no ~~officer~~officer, member, or employee of the State Board of ~~Education~~Education, the Superintendent of Public Instruction, or of a local board of ~~education~~education, individually or collectively, shall be civilly liable for using reasonable force in conformity with State law, State or local rules, or State or local policies regarding the control, discipline, suspension, and expulsion of students. Furthermore, the burden of proof is on the claimant to show that the amount of force used was not reasonable."

SECTION 24. G.S. 115C-521 reads as rewritten:

"§ 115C-521. Erection of school buildings.

...

(b) It shall be the duty of the local boards of education ~~of the several local school administrative school units of the State~~ to make provisions for the public school term by providing adequate school buildings equipped with suitable school furniture and apparatus. The needs and the cost of those buildings, equipment, and apparatus, shall be presented each year when the school budget is submitted to the respective tax-levying authorities. The boards of commissioners shall be given a reasonable time to provide the funds which they, upon investigation, shall find to be necessary for providing their respective units with buildings suitably equipped, and it shall be the duty of the several boards of county commissioners to provide funds for the same.

Upon determination by a local board of education that the existing permanent school building does not have sufficient classrooms to house the pupil enrollment anticipated for the school, the local board of education may acquire and use as temporary classrooms for the

operation of the school, relocatable or mobile classroom units, whether built on the lot or not, which units and method of use shall meet the approval of the School Planning Division of the ~~State Board of Education~~, Department of Public Instruction, and which units shall comply with all applicable requirements of the North Carolina State Building Code and of the local building and electrical codes applicable to the area in which the school is located. These units shall also be anchored in a manner required to assure their structural safety in severe weather. The acquisition and installation of these units shall be subject in all respects to the provisions of Chapter 143 of the General Statutes. The provisions of Chapter 87, Article 1, of the General Statutes, shall not apply to persons, firms or corporations engaged in the sale or furnishing to local boards of education and the delivery and installation upon school sites of classroom trailers as a single building unit or of relocatable or mobile classrooms delivered in less than four units or sections.

...
(f) A local board of education may use prototype designs from the clearinghouse established under subsection (e) of this section that is a previously approved and constructed project by the School Planning Division of the ~~State Board of Education~~, Department of Public Instruction and other appropriate review agencies. The local board of education may contract with the architect of record to make changes and upgrades as necessary for regulatory approval.

...."

SECTION 25. G.S. 115C-535 reads as rewritten:

"§ 115C-535. Authority and rules for organization of system.

The ~~State Board of Education~~Superintendent of Public Instruction is hereby authorized, directed and empowered to establish a division to manage and operate a system of insurance for public school ~~property~~-property in accordance with all needed rules and regulations adopted by the ~~State Board of Education~~. The Board shall adopt such rules and regulations as, in its discretion, may be necessary to provide all details inherent in the insurance of public school property. The ~~Board~~Superintendent of Public Instruction shall employ a director, safety inspectors, engineers and other personnel with suitable training and experience, which in ~~its~~his or ~~her~~ opinion is necessary to insure and protect effectively public school property, and ~~the~~ or ~~she~~ shall fix their compensation consistent with the ~~approval~~policies of the ~~Personnel~~State Human Resources Commission."

SECTION 26. G.S. 116-239.12(g) reads as rewritten:

"(g) There shall be no liability for negligence on the part of the board of trustees, or its employees, or the State Board of ~~Education~~Education, the Superintendent of Public Instruction, or ~~its~~their members or employees, individually or collectively, arising from any act taken or omission by any of them in carrying out the provisions of this section. The immunity established by this subsection shall not extend to gross negligence, wanton conduct, or intentional wrongdoing that would otherwise be actionable. The immunity established by this subsection shall be deemed to have been waived to the extent of indemnification by insurance, indemnification under Articles 31A and 31B of Chapter 143 of the General Statutes, and to the extent sovereign immunity is waived under the Tort Claims Act, as set forth in Article 31 of Chapter 143 of the General Statutes."

SECTION 27. G.S. 143B-146.16(g) reads as rewritten:

"(g) There shall be no liability for negligence on the part of the Secretary, the Department of Health and Human Services or its employees, a residential school or its employees, or the State Board of ~~Education~~Education, Superintendent of Public Instruction, or ~~its~~their members or employees, individually or collectively, arising from any act taken or omission by any of them in carrying out the provisions of this section. The immunity established by this subsection shall not extend to gross negligence, wanton conduct, or intentional wrongdoing that would otherwise be actionable. The immunity established by this subsection shall be deemed to have been waived to the extent of indemnification by insurance,

indemnification under Articles 31A and 31B of Chapter 143 of the General Statutes, and to the extent sovereign immunity is waived under the Tort Claims Act, as set forth in Article 31 of Chapter 143 of the General Statutes."

SECTION 28. Section 8.37 of S.L. 2015-241, as amended by Section 8.30 of S.L. 2016-94, reads as rewritten:

"BUDGET REDUCTIONS/DEPARTMENT OF PUBLIC INSTRUCTION

"SECTION 8.37.(a) Notwithstanding G.S. 143C-6-4, the ~~State Board of Education~~ Department of Public Instruction may, after consultation with the Office of State Budget and Management and the Fiscal Research Division, reorganize the Department of Public Instruction, if necessary, to implement the budget reductions for the 2015-2017 fiscal biennium. Consultation shall occur prior to requesting budgetary and personnel changes through the budget revision process. The ~~State Board~~ Department of Public Instruction shall provide a current organization chart for the Department of Public Instruction in the consultation process and shall report to the Joint Legislative Commission on Governmental Operations on any reorganization.

"SECTION 8.37.(b) In implementing budget reductions for the 2015-2017 fiscal biennium, the ~~State Board of Education~~ Department of Public Instruction shall make no reduction to funding or positions for (i) the North Carolina Center for Advancement of Teaching and (ii) the Eastern North Carolina School for the Deaf, the North Carolina School for the Deaf, and the Governor Morehead School, except that the ~~State Board~~ Superintendent of Public Instruction may, in its discretion, reduce positions at these institutions that have been vacant for more than 16 months. The ~~State Board~~ Department of Public Instruction shall also make no reduction in funding to any of the following entities:

- (1) Communities in Schools of North Carolina, Inc.
- (2) Teach For America, Inc.
- (3) Beginnings for Parents of Children who are Deaf or Hard of Hearing, Inc.

"SECTION 8.37.(c) In implementing budget reductions for the 2016-2017 fiscal year, the Department of Public Instruction shall do all of the following:

- (1) In addition to the prohibition on a reduction to funding and positions for the items listed in subsection (b) of this section, the Department shall make no transfers from or reduction to funding or positions for the following:
 - a. The Excellent Public Schools Act, Read to Achieve Program, initially established under Section 7A.1 of S.L. 2012-142.
 - b. The North Carolina School Connectivity Program.
- (2) The Department shall transfer the sum of fifty thousand dollars (\$50,000) to the Office of Administrative Hearings to be allocated to the Rules Review Commission, created by G.S. 143B-30.1, to pay for any litigation costs incurred in the defense of *North Carolina State Board of Education v. The State of North Carolina and The Rules Review Commission*, Wake County Superior Court, File No. 14 CVS 14791 (filed November 7, 2014). These funds shall not revert at the end of the 2016-2017 fiscal year but shall remain available during the 2017-2018 fiscal year for expenditure in accordance with the provisions of this subdivision."

SECTION 29. By May 15, 2017, the State Board of Education shall revise, as necessary, any of its rules and regulations to comply with the provisions of this Part.

SECTION 30. The Department of Public Instruction shall review all State laws and rules and regulations governing the public school system to ensure compliance with the intent of this Part to restore authority to the Superintendent of Public Instruction as the administrative head of the Department of Public Instruction and the Superintendent's role in the direct supervision of the public school system. By April 15, 2017, the Department of Public

Instruction shall report to the 2017 General Assembly on the results of its review, including any recommended legislation.

SECTION 31. Notwithstanding G.S. 115C-11, as amended by this act, the current student advisor and the local superintendent advisor members serving on the State Board of Education as of the effective date of this Part shall serve the remainder of their terms. Thereafter, as terms expire, or when a vacancy occurs prior to the expiration of a term, the student advisor and local superintendent advisor members on the State Board shall be appointed by the Superintendent of Public Instruction in accordance with G.S. 115C-11, as amended by this act.

SECTION 32. Notwithstanding G.S. 115C-218, as amended by this act, the current members serving on the North Carolina Charter Schools Advisory Board as of the effective date of this Part shall serve the remainder of their terms. For the two terms appointed by the Governor expiring in 2017, one member shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, in accordance with G.S. 120-121, and one member shall be appointed by the State Board of Education in accordance with G.S. 115C-218. For the one term appointed by the Governor expiring in 2019, that member shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, in accordance with G.S. 120-121. As terms expire thereafter or as vacancies occur prior to the expiration of a term, the members on the North Carolina Charter Schools Advisory Board shall be appointed in accordance with G.S. 115C-218, as amended by this act. If a vacancy occurs in a seat appointed by the Governor, the State Board of Education shall fill that vacancy for the remainder of that term. Upon expiration of that term, the member shall be appointed in accordance with G.S. 115C-218.

SECTION 33. Sections 1 through 6 and Sections 8 through 32 of this Part become effective January 1, 2017. The remainder of this Part is effective when it becomes law.

PART II. MODIFY APPOINTMENT OF UNC BOARDS OF TRUSTEES

SECTION 35. G.S. 116-31 reads as rewritten:

"§ 116-31. Membership of the boards of trustees.

(a) ~~All persons who, as of June 30, 1972, are serving as trustees of the regional universities and of the North Carolina School of the Arts, redesignated effective August 1, 2008, as the "University of North Carolina School of the Arts," except those who may have been elected to the Board of Governors, shall continue to serve for one year beginning July 1, 1972, and the terms of all such trustees shall continue for the period of one year.~~

(b) Effective July 1, 1972, a separate board of trustees shall be created for each of the following institutions: North Carolina State University at Raleigh, the University of North Carolina at Asheville, the University of North Carolina at Chapel Hill, the University of North Carolina at Charlotte, the University of North Carolina at Greensboro, and the University of North Carolina at Wilmington. ~~For the period commencing July 1, 1972, and ending June 30, 1973, each such board shall be constituted as follows:~~

(1) ~~Twelve or more persons elected prior to July 1, 1972, by and from the membership of the Board of Trustees of the University of North Carolina, and~~

(2) ~~The president of the student government of the institution, ex officio.~~

(c) ~~If any vacancy should occur in any board of trustees during the year beginning July 1, 1972, the Governor may appoint a person to serve for the balance of the year.~~

(d) Except as provided in G.S. 116-65, ~~effective July 1, 1973,~~ each of the 16 institutions of higher education set out in G.S. 116-2(4) shall have board of trustees composed of 13 persons chosen as follows:

(1) Eight elected by the Board of ~~Governors,~~Governors.

(2) ~~Four appointed by the Governor, and~~

(2a) Four members appointed by the General Assembly under G.S. 120-121, two of whom shall be appointed upon the recommendation of the President Pro Tempore of the Senate and two of whom shall be appointed upon the recommendation of the Speaker of the House of Representatives.

(3) The president of the student government ex officio.

The Board of Trustees of the North Carolina School of Science and Mathematics shall be established in accordance with G.S. 116-233.

(e) ~~From and after July 1, 1973, the~~The term of office of all trustees, except the ex officio member, shall be four years, commencing on July 1 of odd-numbered years. In every odd-numbered year the Board of Governors shall elect four persons to each board of trustees and the ~~Governor-General Assembly~~ shall appoint ~~two persons~~ one person upon the recommendation of the President Pro Tempore of the Senate and one person upon the recommendation of the Speaker of the House of Representatives to each such board.

(g) ~~From and after July 1, 1973, any~~Any person who has served two full four-year terms in succession as a member of a board of trustees shall, for a period of one year, be ineligible for election or appointment to the same board but may be elected or appointed to the board of another institution.

(h) No member of the General Assembly or officer or employee of the State, The University of North Carolina, or any constituent institution shall be eligible for election or appointment as a trustee. No spouse of a member of the General Assembly, or of an officer or employee of a constituent institution may be a trustee of that constituent institution. Any trustee who is elected or appointed to the General Assembly or who becomes an officer or employee of the State, The University of North Carolina, or any constituent institution or whose spouse is elected or appointed to the General Assembly or becomes an officer or employee of that constituent institution shall be deemed thereupon to resign from his or her membership on the board of trustees.

(i) No person may serve simultaneously as a member of a board of trustees and as a member of the Board of Governors. Any trustee who is elected or appointed to the Board of Governors shall be deemed to resign as a trustee effective as of the date that his or her term commences as a member of the Board of Governors.

(j) ~~From and after July 1, 1973, whenever~~Whenever any vacancy shall occur in the membership of a board of trustees among those appointed by the ~~Governor-General Assembly~~, it shall be the duty of the secretary of the board to inform the ~~Governor-General Assembly~~ of the existence of such vacancy, and the ~~Governor~~ shall appoint a person to fill the ~~unexpired term~~, vacancy shall be filled as provided in G.S. 120-122, and whenever any vacancy shall occur among those elected by the Board of Governors, it shall be the duty of the secretary of the board to inform the Board of Governors of the existence of the vacancy, and the Board of Governors shall elect a person to fill the unexpired term. Whenever a member shall fail, for any reason other than ill health or service in the interest of the State or nation, to be present for three successive regular meetings of a board of trustees, his or her place as a member shall be deemed vacant."

SECTION 36. G.S. 116-233 reads as rewritten:

"§ 116-233. Board of Trustees; appointment; terms of office.

(a) Notwithstanding the provisions of G.S. 116-31(d), there shall be a Board of Trustees of the School, which shall consist of up to 30 members as follows:

(1) Thirteen members who shall be appointed by the Board of Governors of The University of North Carolina, one from each congressional district.

(2) Four members without regard to residency who shall be appointed by the Board of Governors of The University of North Carolina.

- (3) Three members, ex officio, who shall be the chief academic officers, respectively, of constituent institutions. The Board of Governors shall in 1985 and quadrennially thereafter designate the three constituent institutions whose chief academic officers shall so serve, such designations to expire on June 30, 1989, and quadrennially thereafter.
- (4) The chief academic officer of a college or university in North Carolina other than a constituent institution, ex officio. The Board of Governors shall designate in 1985 and quadrennially thereafter which college or university whose chief academic officer shall so serve, such designation to expire on June 30, 1989, and quadrennially thereafter.
- (5) ~~Two~~ Three members appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121.
- (6) ~~Two~~ Three members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121.
- ~~(7) Two members appointed by the Governor.~~
- (8) The president of the student government, ex officio, who shall be a nonvoting member.
- (9) Up to two additional nonvoting members selected at the discretion of the chancellor and the Board of Trustees, with terms expiring June 30 of each year.

(b) Appointed members of the Board of Trustees shall be selected for their interest in and commitment to public education and to the purposes of the School, and they shall be charged with the responsibility of serving the interests of the whole State. In appointing members, the objective shall be to obtain the services of the best qualified persons, taking into consideration the desirability of diversity of membership, including men and women, representatives of different races, and members of different political parties.

(c) No member of the General Assembly or officer or employee of the State, the School, The University of North Carolina, or of any constituent institution of The University of North Carolina, shall be eligible to be appointed to the Board of Trustees except as specified under subdivision (3) of subsection (a) of this section. No spouse of a member of the General Assembly, or of an officer or employee of the school may be a member of the Board of Trustees. Any appointed trustee who is elected or appointed to the General Assembly or who becomes an officer or employee of the State, except as specified under subdivision (3) of subsection (a) of this section, or whose spouse is elected or appointed to the General Assembly or becomes such an officer or employee of the School, shall be deemed thereupon to resign from his or her membership on the Board of Trustees. This subsection does not apply to ex officio members.

(d) Members appointed under subdivisions (1) or (2) of subsection (a) of this section shall serve staggered four-year terms expiring June 30 of odd numbered years.

(d1) Only an ex officio member shall be eligible to serve more than two successive terms.

(d2) Any vacancy in the membership of the Board of Trustees appointed under G.S. 116-233(a)(1) or (2) shall be reported promptly by the Secretary of the Board of Trustees to the Board of Governors of The University of North Carolina, which shall fill any such vacancy by appointment of a replacement member to serve for the balance of the unexpired term. Any vacancy in members appointed under G.S. 116-233(a)(5) or (6) shall be filled in accordance with G.S. 120-122. ~~Any vacancy in members appointed under G.S. 116-233(a)(7) shall be filled by the Governor for the remainder of the unexpired term. Reapportionment of~~

congressional districts does not affect the right of any member to complete the term for which the member was appointed.

(e) ~~Of the initial members appointed under G.S. 116-233(a)(5), G.S. 116-233(a)(5) in 1985, one member shall serve a term to expire June 30, 1987, and one member shall serve a term to expire June 30, 1989. Subsequent appointments shall be for four-year terms. The initial members appointed under G.S. 116-233(a)(6), G.S. 116-233(a)(6) in 1985 shall be appointed for terms to expire June 30, 1987. Subsequent appointments shall be for two-year terms. The initial members appointed under G.S. 116-233(a)(7) shall be appointed for terms to expire January 15, 1989. Successors shall be appointed for four-year terms until January 15, 2017, at which point subsequent appointments shall be for four-year terms.~~

(e1) The initial members appointed under G.S. 116-233(a)(5) and (6) in 2017, and successors of those members, shall serve four-year terms.

(f) Whenever an appointed member of the Board of Trustees shall fail, for any reason other than ill health or service in the interest of the State or nation, to be present at three successive regular meetings of the Board, his or her place as a member of the Board shall be deemed vacant."

SECTION 37. This Part is effective when it becomes law and applies to (i) vacancy appointments made on or after that date and (ii) appointments to fill terms expiring January 15, 2017, and thereafter. A vacancy by any board member appointed by the Governor to any board affected by this Part shall be filled by joint recommendation of the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as provided in G.S. 120-121. The terms of members holding office as of the effective date of this Part shall not be affected.

PART III. SENATE CONFIRMATION OF CABINET APPOINTEES

SECTION 38. G.S. 143B-9 reads as rewritten:

"§ 143B-9. Appointment of officers and employees.

(a) The head of each principal State department, except those departments headed by popularly elected officers, shall be appointed by the Governor and serve at his-the Governor's pleasure. The salary of the head of each of the principal State departments shall be set by the Governor, and the salary of elected officials shall be as provided by law.

For each head of each principal State department covered by this subsection, the Governor shall notify the President of the Senate of the name of each person to be appointed, and the appointment shall be subject to senatorial advice and consent in conformance with Section 5(8) of Article III of the North Carolina Constitution unless (i) the senatorial advice and consent is expressly waived by an enactment of the General Assembly or (ii) a vacancy occurs when the General Assembly is not in regular session. Any person appointed to fill a vacancy when the General Assembly is not in regular session may serve without senatorial advice and consent for no longer than the earlier of the following:

- (1) The date on which the Senate adopts a simple resolution that specifically disapproves the person appointed.
- (2) The date on which the General Assembly shall adjourn pursuant to a joint resolution for a period longer than 30 days without the Senate adopting a simple resolution specifically approving the person appointed.

(b) The head of a principal State department shall appoint a chief deputy or chief assistant, and such chief deputy or chief assistant shall not be subject to the North Carolina Human Resources Act. The salary of such chief deputy or chief assistant shall be set by the Governor. Unless otherwise provided for in the Executive Organization Act of 1973, and subject to the provisions of the ~~Personnel~~ Human Resources Act, the head of each principal State department shall designate the administrative head of each transferred agency and all employees of each division, section, or other unit of the principal State department."

SECTION 39. This Part is effective when it becomes law.

PART IV. ESTABLISH TASK FORCE FOR SAFER SCHOOLS; TRANSFER CENTER FOR SAFER SCHOOLS

SECTION 41.1.(a) Effective December 15, 2016, the Center for Safer Schools is hereby moved to the Department of Public Instruction, Division of Safe and Healthy Schools Support. This transfer shall have all of the elements of a Type I transfer, as defined in G.S. 143A-6.

SECTION 41.1.(b) Article 8C of Chapter 115C of the General Statutes is amended by adding two new sections to read:

"§ 115C-105.55. Establish Task Force for Safer Schools.

(a) Task Force Established. – There is hereby created the Task Force for Safer Schools within the North Carolina Department of Public Instruction.

(b) Membership. – The Task Force shall consist of 25 members. The composition of the Task Force shall include all of the following:

- (1) The Secretary of the Department of Public Safety or the Secretary's designee.**
- (2) The Secretary of the Department of Health and Human Services or the Secretary's designee.**
- (3) A member of the State Board of Education appointed by the Governor.**
- (4) Two local school board members appointed by the Chair of the State Board of Education.**
- (5) A representative from the North Carolina Department of Public Safety, Division of Emergency Management, appointed by the Secretary of the Department of Public Safety.**
- (6) A representative from the North Carolina Justice Academy appointed by the Attorney General.**
- (7) A member of the Governor's Crime Commission appointed by the Governor.**
- (8) Two local law enforcement officers appointed by the Governor.**
- (9) Two public school administrators appointed by the Chair of the State Board of Education.**
- (10) A public school teacher appointed by the Chair of the State Board of Education.**
- (11) A public school psychologist appointed by the Governor.**
- (12) A public school resource officer appointed by the Governor.**
- (13) Two high school students currently enrolled at public high schools appointed by the Governor.**
- (14) A parent of a currently enrolled public school student appointed by the Governor.**
- (15) A juvenile justice professional appointed by the Governor.**
- (16) A North Carolina licensed social worker appointed by the Governor.**
- (17) A North Carolina licensed school counselor appointed by the Governor.**
- (18) An expert in gang intervention and prevention in schools appointed by the Governor.**
- (19) Three at-large members appointed by the Governor.**

(c) Appointment of Chair and Vice-Chair. – The Governor shall appoint a Chair and Vice-Chair from among the membership of the Task Force. The Chair and Vice-Chair shall serve at the pleasure of the Governor.

(d) Terms; Vacancies. – Effective December 1, 2016, all members shall be appointed for a term of four years. Members may be reappointed to successive terms. Any appointment to

fill a vacancy on the Task Force created by the resignation, dismissal, death, disability, or disqualification of a member shall be for the balance of the unexpired term.

(e) Removal. – The Governor shall have the authority to remove any member of the Task Force for misfeasance, malfeasance, or nonfeasance, pursuant to the provisions of G.S. 143B-13.

(f) Per Diem, Etc. – Members of the Task Force may receive necessary per diem, subsistence, and travel allowances in accordance with G.S. 120-3.1, 138-5, or 138-6, as appropriate.

"§ 115C-105.56. Task Force for Safer Schools; powers and duties.

The Task Force shall have all of the following duties:

- (1) To serve as an advisory board to the Center for Safer Schools.
- (2) To provide guidance and recommendations to the Governor, Superintendent of Public Instruction, and the General Assembly to improve statewide policy to enhance statewide and local capacities to create safer schools.
- (3) To encourage interagency collaboration among State and local government agencies to achieve effective policies and streamline efforts to create safer schools.
- (4) To Assist the Center for Safer Schools in collecting and disseminating information on recommended best practices and community needs related to creating safer schools in North Carolina.
- (5) Other duties as assigned by the State Board of Education."

PART V. SEVERABILITY CLAUSE AND EFFECTIVE DATE

SECTION 42. If any provision of this act or its application is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provisions or application, and to this end, the provisions of this act are severable.

SECTION 43. Except as otherwise provided, this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 16th day of December, 2016.

s/ Daniel J. Forest
President of the Senate

s/ Tim Moore
Speaker of the House of Representatives

s/ Pat McCrory
Governor

Approved 4:30 p.m. this 19th day of December, 2016

Exhibit B

CONSTITUTION OF NORTH CAROLINA OF 1868

DELEGATES TO THE CONSTITUTIONAL CONVENTION⁷⁹

Raleigh, January 14-March 17, 1868

President, Calvin J. Cowles, Wilkes

President *Pro Tem*, Richard W. King,⁸⁰ Lenoir

Secretary, T. A. Byrnes, Cumberland

Secretary *Pro Tem*, Joshua P. Andrews,⁸¹ WakeJames H. Harris,⁸² Wake

Assistant Secretary, John H. Bonner, [Wake]

Name	District	County	Name	District	County
W. A. B. Murphey	1		Wilson Carey	25	Caswell
John S. Parks	1		Phillip Hodnett	25	Caswell
William H. Logan	2	Rutherford	Henry M. Ray	26	Alamance
Jesse Rhodes	2	Henderson	William Merritt	27	Person
Julius S. Garland	3	[Mitchell]	John W. Graham	28	Orange
Thomas J. Candler	4	Buncombe	Edwin M. Holt	28	Orange
James H. Duckworth	4	Transylvania	William T. Gunter	29	Chatham
George W. Gahagan	4	Madison	John A. McDonald	29	Chatham
W. G. B. Garrett	5	Haywood	Joshua P. Andrews	30	Wake
George W. Dickey	6	Cherokee	Stokes D. Franklin	30	Wake
Mark May	6	Macon	James H. Harris	30	Wake
Edwin C. Bartlett ⁸³	7	Alleghany	B. S. D. Williams	30	Wake
Evan Benbow	7	Yadkin	Cuffey Mayo	31	Granville
George W. Bradley	7	Watauga	James J. Moore	31	Granville
Samuel Forkner	7	Surry	John W. Ragland	31	Granville
John G. Marler ⁸⁴	7	Yadkin	John A. Hyman	32	Warren
John H. Marshall ⁸⁵	7	Surry	John Read	32	Warren
John Q. A. Bryan	8	Wilkes	James T. Harris	33	Franklin
Calvin J. Cowles	8	Wilkes	John H. Williamson	33	Franklin
Wesley H. George	8	Iredell	James H. Hood	34	Cumberland
Calvin C. Jones	8	Caldwell	William A. Mann	34	Cumberland
Jerry Smith	8	Alexander	James M. Turner	35	Harnett
Milton Hobbs	9	Davie	Swain S. McDonald	36	Moore
Allen Rose	9	Rowan	George A. Graham	37	Montgomery
Isaac M. Shaver ⁸⁶	9	Rowan	Richmond T. Long, Sr.	38	Richmond
James S. McCubbins ⁸⁷	9	Rowan	Hiram L. Grant	39	Wayne
Plato Durham	10	Cleveland	Jesse Hollowell	39	Wayne
James R. Ellis	11	Catawba	Nathan Gulley	40	Johnston
Joseph H. King	12	Lincoln	John M. Patrick	41	Greene
Milot J. Aydlott	13	Gaston	Willie Daniel	42	Wilson
Edward Fullings	14	Mecklenburg	Jacob Ing	43	Nash
Silas N. Stilwell	14	Mecklenburg	Henry Eppes	44	Halifax
William Newson	15	Union	J. J. Hayes	44	Halifax
William T. Blume	16	Cabarrus	John H. Renfrow	44	Halifax
Levi C. Morton	17	Stanly	Henry T. Grant	45	Northampton
Henry Chillson	18	Anson	Roswell C. Parker	45	Northampton
George Tucker	18	Anson	Joseph H. Baker	46	Edgecombe
Riley F. Petree	19	Stokes	Henry C. Cherry	46	Edgecombe
Elijah B. Teague	20	Forsyth	Henry A. Dowd	46	Edgecombe
Isaac Kinney	21	Davidson	Richard W. King	47	Lenoir
Spencer Mullican	21	Davidson	Edwin Legg	48	Brunswick
Talton L. L. Cox	22	Randolph	Hayes Lennon	49	Colombus
Reuben F. Trogon	22	Randolph	O. S. Hayes	50	Robeson
Albion W. Tourgee	23	Guilford	Joshua L. Nance	50	Robeson
G. William Welker	23	Guilford	Abiel W. Fisher	51	Bladen
Henry Barnes	24	Rockingham	Frederick F. French	51	Bladen
John French	24	Rockingham	Joseph C. Abbott	52	New Hanover

SEC. 4. It shall be the duty of the Legislature to provide for the organization of cities, towns, and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and in contracting debts, by such municipal corporation.

Article IX.

Education.

SECTION 1. Religion, morality, and knowledge being necessary to good government and happiness of mankind, schools, and the means of education, shall forever be encouraged.

SEC. 2. The General Assembly at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of Public Schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one years.

SEC. 3. Each County of the State shall be divided into a convenient number of Districts, in which one or more Public Schools shall be maintained, at least four months in every year; and if the Commissioners of any County shall fail to comply with the aforesaid requirement of this section, they shall be liable to indictment.

SEC. 4. The proceeds of all lands that have been, or hereafter may be, granted by the United States to this State and not otherwise specially appropriated by the United States or heretofore by this State; also all monies, stocks, bonds, and other property now belonging to any fund for purposes of Education; also the net proceeds that may accrue to the State from sales of estrays or from fines, penalties and forfeitures; also the proceeds of all sales of the swamp lands belonging to the State; also all money that shall be paid as an equivalent for exemptions from military duty; also, all grants, gifts or devises that may hereafter be made to this State, and not otherwise appropriated by the grant, gift or devise, shall be securely invested, and sacredly preserved as an irreducible educational fund, the annual income of which, together with so much of the ordinary revenue of the State as may be necessary, shall be faithfully appropriated for establishing and perfecting, in this State, a system of Free Public Schools, and for no other purposes or uses whatsoever.

SEC. 5. The University of North Carolina with its lands, emoluments and franchises, is under the Control of the State, and shall be held to an inseparable connection with the Free Public School System of the State.

SEC. 6. The General Assembly shall provide that the benefits of the University, as far as practicable, be extended to the youth of the State free of expense for tuition; also, that all the property which has heretofore accrued to the State, or shall hereafter accrue from escheats, unclaimed dividends or distributive shares of the estates of deceased persons, shall be appropriated to the use of the University.

SEC. 7. The Governor, Lieutenant-Governor, Secretary of State, Treasurer, Auditor, Superintendent of Public Works, Superintendent of Public Instruction and Attorney General, shall constitute a State Board of Education.

SEC. 8. The Governor shall be President, and the Superintendent of Public Instruction shall be Secretary, of the Board of Education.

SEC. 9. The Board of Education shall succeed to all the powers and trusts of the President and directors of the Literary Fund of North Carolina, and shall have full power to legislate and make all needful rules and regulations in relation to Free Public Schools, and the Educational fund of the State; but all acts, rules and regulations of said Board may be altered, amended, or repealed by the General Assembly, and when so altered, amended or repealed by the General Assembly, and when so altered, amended or repealed they shall not be reenacted by the Board.

SEC. 10. The first session of the Board of Education shall be held at the Capital of the State, within fifteen days after the organization of the State Government under this Constitution; the time of future meetings may be determined by the Board.

SEC. 11. A majority of the Board shall constitute a quorum for the transaction of business.

SEC. 12. The contingent expenses of the Board shall be provided for by the General Assembly.

SEC. 13. The Board of Education shall elect Trustees for the University, as follows: One trustee for each County in the State, whose term of office shall be eight years. The first meeting of the Board shall be held within ten days after their election, and at this and every subsequent meeting, ten Trustees shall constitute a quorum. The Trustees, at their first meeting, shall be divided, as equally as may be, into four classes. The seats of the first class shall be vacated at the expiration of two years; of the second class at the expiration of four years; of the third class at the expiration of six years; of the fourth class at the expiration of eight years; so that one fourth may be chosen every second year.

SEC. 14. The Board of Education and the President of the University, shall be *ex officio* members of the Board of Trustees of the University; and shall, with three other Trustees to be appointed by the Board of Trustees, constitute the Executive Committee of the Trustees of the University of North Carolina, and shall be clothed with the powers delegated to the Executive Committee under the existing organization of the Institution. The Governor shall be *ex officio* President of the Board of Trustees and Chairman of the Executive Committee of the University. The Board of Education shall provide for the more perfect organization of the Board of Trustees.

SEC. 15. All the privileges, rights, franchises and endowments heretofore granted to, or conferred upon, the Board of Trustees of the University of North Carolina by the Charter of 1789, or by any subsequent legislation, are hereby vested in the Board of Trustees, authorized by this Constitution, for the perpetual benefit of the University.

SEC. 16. As soon as practicable after the adoption of this Constitution, the General Assembly shall establish and maintain, in connection with the University, a Department of Agriculture, of Mechanics, of Mining and of Normal Instruction.

SEC. 17. The General Assembly is hereby empowered to enact that every child of sufficient mental and physical ability, shall attend the Public Schools during the period between the ages of six and eighteen years, for a term of not less than sixteen months, unless educated by other means.

Exhibit C

CONSTITUTION
OF THE
State of North Carolina

PREAMBLE

We, the people of the State of North Carolina, grateful to Almighty God, the Sovereign Ruler of Nations, for the preservation of the American Union and the existence of our civil, political and religious liberties, and acknowledging our dependence upon Him for the continuance of those blessings to us and our posterity, do, for the more certain security thereof and for the better government of this State, ordain and establish this Constitution.

ARTICLE I

DECLARATION OF RIGHTS

That the great, general, and essential principles of liberty and free government may be recognized and established, and that the relations of this State to the Union and government of the United States and those of the people of this State to the rest of the American people may be defined and affirmed, we do declare that:

SECTION 1. *The equality and rights of persons.* We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

SEC. 2. *Sovereignty of the people.* All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

SEC. 3. *Internal government of the State.* The people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness; but every such right shall be exercised in pursuance of law and consistently with the Constitution of the United States.

SEC. 4. *Secession prohibited.* This State shall ever remain a member of the American Union; the people thereof are part of the American nation; there is no right on the part of this State to secede; and all attempts, from whatever source or upon whatever pretext, to dissolve this Union or to sever this Nation, shall be resisted with the whole power of the State.

SEC. 5. *Allegiance to the United States.* Every citizen of this State owes paramount allegiance to the Constitution and government of the United States, and no law or ordinance of the State in contravention or subversion thereof can have any binding force.

ARTICLE IX

EDUCATION

SECTION 1. *Education encouraged.* Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged.

SEC. 2. *Uniform system of schools.*

(1) *General and uniform system; term.* The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.

(2) *Local responsibility.* The General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate. The governing boards of units of local government with financial responsibility for public education may use local revenues to add to or supplement any public school or post-secondary school program.

SEC. 3. *School attendance.* The General Assembly shall provide that every child of appropriate age and of sufficient mental and physical ability shall attend the public schools, unless educated by other means.

SEC. 4. *State Board of Education.*

(1) *Board.* The State Board of Education shall consist of the Lieutenant Governor, the Treasurer, and eleven members appointed by the Governor, subject to confirmation by the General Assembly in joint session. The General Assembly shall divide the State into eight educational districts. Of the appointive members of the Board, one shall be appointed from each of the eight educational districts and three shall be appointed from the State at large. Appointments shall be for overlapping terms of eight years. Appointments to fill vacancies shall be made by the Governor for the unexpired terms and shall not be subject to confirmation.

(2) *Superintendent of Public Instruction.* The Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education.

SEC. 5. *Powers and duties of Board.* The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

SEC. 6. *State school fund.* The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; all moneys, stocks, bonds, and other property belonging to the State for purposes of public education; the net proceeds of all sales of the swamp lands belonging to the State; and all other grants, gifts, and devises that have been or hereafter may be made to the State, and not otherwise appropriated by the State or

by the terms of the grant, gift, or devise, shall be paid into the State Treasury and, together with so much of the revenue of the State as may be set apart for that purpose, shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools.

SEC. 7. *County school fund.* All moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

SEC. 8. *Higher education.* The General Assembly shall maintain a public system of higher education, comprising The University of North Carolina and such other institutions of higher education as the General Assembly may deem wise. The General Assembly shall provide for the selection of trustees of The University of North Carolina and of the other institutions of higher education, in whom shall be vested all the privileges, rights, franchises, and endowments heretofore granted to or conferred upon the trustees of these institutions. The General Assembly may enact laws necessary and expedient for the maintenance and management of The University of North Carolina and the other public institutions of higher education.

SEC. 9. *Benefits of public institutions of higher education.* The General Assembly shall provide that the benefits of The University of North Carolina and other public institutions of higher education, as far as practicable, be extended to the people of the State free of expense.

SEC. 10. *Escheats.*

(1) *Escheats prior to July 1 1971.* All property that prior to July 1, 1971, accrued to the State from escheats, unclaimed dividends, or distributive shares of the estates of deceased persons shall be appropriated to the use of The University of North Carolina.

(2) *Escheats after June 30, 1971.* All property that, after June 30, 1971, shall accrue to the State from escheats, unclaimed dividends, or distributive shares of the estates of deceased persons shall be used to aid worthy and needy students who are residents of this State and are enrolled in public institutions of higher education in this State. The method, amount, and type of distribution shall be prescribed by law.

ARTICLE X

HOMESTEADS AND EXEMPTIONS

SECTION 1. *Personal property exemptions.* The personal property of any resident of this State, to a value fixed by the General Assembly but not less than \$500, to be selected by the resident, is exempted from sale under execution or other final process of any court, issued for the collection of any debt.

SEC. 2. *Homestead exemptions.*

Exhibit D

16-CVS-15607

Transcript produced by computer-aided transcription

<p style="text-align: right;">Page 2</p> <p>1 APPEARANCES</p> <p>2 ON BEHALF OF THE PLAINTIFF:</p> <p>3 Robert F. Orr, Esquire</p> <p>4 Robert F. Orr, PLLC</p> <p>5 3434 Edwards Mill, Suite 112-372</p> <p>6 Raleigh, North Carolina 27612</p> <p>7 (919) 608-5335</p> <p>8</p> <p>9 Andrew Erteschik, Esquire</p> <p>10 Poyner Spruill, LLP</p> <p>11 301 Fayetteville Street, Suite 1900</p> <p>12 Raleigh, North Carolina 27601</p> <p>13 (919) 783-2895</p> <p>14</p> <p>15 J.M. Durnovich, Esquire</p> <p>16 Poyner Spruill, LLP</p> <p>17 301 South College Street, Suite 2300</p> <p>18 Charlotte, North Carolina 28202</p> <p>19 (704) 342-5344</p> <p>20</p> <p>21 ON BEHALF OF THE DEFENDANT:</p> <p>22 Amar Majmundar, Esquire</p> <p>23 Olga Vysotskaya, Esquire</p> <p>24 Office of the Attorney General</p> <p>25 North Carolina Department of Justice</p> <p>114 West Edenton Street</p> <p>Raleigh, North Carolina 27603</p> <p>(919) 716-6820</p>	<p style="text-align: right;">Page 4</p> <p>1 we can't afford that, so we are recording this</p> <p>2 audio. We do that, we would encourage you to,</p> <p>3 first, tell us who you are so the record will</p> <p>4 reflect that. Second, speak audibly and succinctly</p> <p>5 so we can all hear today what you said and also some</p> <p>6 person later trying to decipher it all will be able</p> <p>7 to understand it listening to an audio that they</p> <p>8 didn't see and hear. And please everyone don't</p> <p>9 speak at the same time if you can avoid that.</p> <p>10 So let me ask the Plaintiffs, I do recognize</p> <p>11 a few folks, but anyway if you would identify</p> <p>12 yourselves from left to my right on behalf first of</p> <p>13 the Plaintiff and then on behalf of whoever is here</p> <p>14 in response to this lawsuit.</p> <p>15 MR. ORR: All right. Your Honor, I'm Bob Orr</p> <p>16 on behalf of the State Board of Education.</p> <p>17 THE COURT: Still Bob Orr?</p> <p>18 MR. ORR: Still Bob Orr, your Honor.</p> <p>19 THE COURT: Okay.</p> <p>20 MR. ERTESCHIK: Good afternoon, your Honor.</p> <p>21 Drew Erteschik with Poyner Spruill, and I have here</p> <p>22 my colleague, J.M. Durnovich, also from Poyner</p> <p>23 Spruill.</p> <p>24 THE COURT: Okay.</p> <p>25 MR. ERTESCHIK: We are honored to represent</p>
<p style="text-align: right;">Page 3</p> <p>1 The above-entitled matter came on for hearing</p> <p>2 before the Honorable Donald Stephens, judge</p> <p>3 presiding, on the 29th day of December, 2016, in</p> <p>4 Raleigh, North Carolina.</p> <p>5 -----</p> <p>6 THE COURT: On the file in the civil action,</p> <p>7 looks like it's 16-CVS-15607. It's captioned, let's</p> <p>8 see, the summons that I have at the point that I</p> <p>9 have shows caption, North Carolina State Board of</p> <p>10 Education as the Plaintiff and the State of North</p> <p>11 Carolina as Defendant. The certification of notice</p> <p>12 of the request for hearing this afternoon on the</p> <p>13 Plaintiff's motion for temporary restraining order</p> <p>14 appears to have served notice on the Office of the</p> <p>15 Pro Tempore of the North Carolina Senate, Philip</p> <p>16 Berger; the Office of the Speaker of the House,</p> <p>17 Representative Timothy Moore; on the Superintendent</p> <p>18 of Public Instruction, Mark Johnson; and notice was</p> <p>19 also obviously given to the Attorney General's</p> <p>20 Office, more particularly, to Grayson Kelley who is</p> <p>21 head of the litigation section.</p> <p>22 We being the, the judicial governing branch</p> <p>23 of the government being the stepchild of the three</p> <p>24 branches, we don't have a live court reporter here</p> <p>25 taking down what everybody says because apparently</p>	<p style="text-align: right;">Page 5</p> <p>1 the State Board of Education.</p> <p>2 THE COURT: Great. Thank you. Welcome.</p> <p>3 MR. ORR: Thank you.</p> <p>4 THE COURT: On behalf of whoever is here to</p> <p>5 respond.</p> <p>6 MR. MAJMUNDAR: Good afternoon, your Honor.</p> <p>7 My name is Amar Majmundar. I'm with the Attorney</p> <p>8 General's Office here on behalf of the State.</p> <p>9 THE COURT: Okay.</p> <p>10 MS. VYSOTSKAYA: And your Honor, my name is</p> <p>11 Olga Vysotskaya. I'm a Special Deputy Attorney</p> <p>12 General on behalf of the State.</p> <p>13 THE COURT: All right.</p> <p>14 MR. MAJMUNDAR: We'll be glad to provide</p> <p>15 spelling.</p> <p>16 MS. VYSOTSKAYA: Yes.</p> <p>17 THE COURT: I understand. Have you filed</p> <p>18 anything?</p> <p>19 MR. MAJMUNDAR: We have not, your Honor.</p> <p>20 THE COURT: Okay. All right. You might want</p> <p>21 to let, let the clerk handle your specific spelling</p> <p>22 for your name before you leave here today, or if you</p> <p>23 have cards, that would be fine. And I, I apologize</p> <p>24 profusely, but Olga, I may end up having to call you</p> <p>25 over. Okay?</p>

<p style="text-align: right;">Page 6</p> <p>1 MS. VYSOTSKAYA: That is fine.</p> <p>2 THE COURT: I apologize. That's not</p> <p>3 something that I would normally do. At least we'll</p> <p>4 know who I'm talking to. Otherwise, it might be</p> <p>5 confusing.</p> <p>6 All right. I read the complaint. Looks kind</p> <p>7 of straightforward to me. So I don't know, I kind</p> <p>8 of had more questions about the specific injunctive</p> <p>9 relief that the Plaintiffs seek today, and whether</p> <p>10 or not this Court has jurisdiction to do anything in</p> <p>11 view of the past legislation that sort of gives the</p> <p>12 senior resident judge in the county of which an</p> <p>13 action like this is filed, the administrative use of</p> <p>14 notifying the Chief Justice that such a lawsuit is</p> <p>15 filed, that it is a claim that facially challenges</p> <p>16 the constitutionality of an act of the General</p> <p>17 Assembly, and to request the Chief Justice to</p> <p>18 appoint three judges to a panel of superior court to</p> <p>19 hear and consider the constitutional challenge.</p> <p>20 The law is unclear as to what the presiding</p> <p>21 or senior resident judge in the county in which the</p> <p>22 action is filed has the authority to do beyond that.</p> <p>23 However, the law does not specifically say the court</p> <p>24 shall not, may not, cannot restrain legislation of</p> <p>25 the General Assembly that's challenged as</p>	<p style="text-align: right;">Page 8</p> <p>1 Honor has honed in on the, on the exigency issue,</p> <p>2 which really is the first and foremost reason why</p> <p>3 this Court has the authority to, to issue a TRO. So</p> <p>4 the fact is, as your Honor has, has pointed out, the</p> <p>5 General Assembly when it enacted the 3-judge panel</p> <p>6 statute neglected to address a TRO situation like</p> <p>7 this one.</p> <p>8 THE COURT: I don't know if they neglected</p> <p>9 to. They chose not to.</p> <p>10 MR. ERTESCHIK: Or, or perhaps they did, your</p> <p>11 Honor. Perhaps, but in any event, the statute does</p> <p>12 not address a TRO situation. And so the, the</p> <p>13 realities of, of having the Chief Justice select a</p> <p>14 panel, appoint a panel, have the panel be available</p> <p>15 for a TRO, a situation like this one where</p> <p>16 legislation was passed in a matter of hours, less</p> <p>17 than 48 hours, immediately before Christmas with an</p> <p>18 effective date of New Year's, if the trial court</p> <p>19 doesn't have inherent authority to issue a TRO in a</p> <p>20 situation like that, I'm not sure when it could.</p> <p>21 And it should come as no surprise to the</p> <p>22 General Assembly in a statute that's silent on a TRO</p> <p>23 issue like this one that a trial court would have to</p> <p>24 exercise that inherent authority. So your Honor</p> <p>25 has, has hit on the factual situation on the ground.</p>
<p style="text-align: right;">Page 7</p> <p>1 unconstitutional unless and until such time as three</p> <p>2 judges determine it is unconstitutional.</p> <p>3 It doesn't say the senior resident judge or</p> <p>4 presiding judge shall not, cannot, or may not at</p> <p>5 all. So I assume if that was the law, then they</p> <p>6 would have declared that the senior resident judge</p> <p>7 shall not, cannot, may not enjoin an act of the</p> <p>8 legislature that on its face would be unlawful,</p> <p>9 unconstitutional, without questioning it.</p> <p>10 Otherwise, the people would have no right to</p> <p>11 stop and restrain a clearly unconstitutional act.</p> <p>12 And if it went on this way through the courts for 6</p> <p>13 or 8 or 10 or 12 months, that would be most</p> <p>14 unfortunate. It might imbalance the balance of</p> <p>15 powers between three separate entities that the</p> <p>16 people recognize as the way in which they govern</p> <p>17 themselves.</p> <p>18 So I'm kind of curious as to that. So tell</p> <p>19 me even if I have authority, first, to do anything,</p> <p>20 and then we'll talk about whether or not I should.</p> <p>21 MR. ERTESCHIK: Your Honor, just to state for</p> <p>22 the record, my name is Drew Erteschik, just because</p> <p>23 we don't have a court reporter here today.</p> <p>24 THE COURT: Sure.</p> <p>25 MR. ERTESCHIK: So, your Honor, I think your</p>	<p style="text-align: right;">Page 9</p> <p>1 Let me also, it may be helpful to, to add</p> <p>2 that there are two doctrinal reasons in addition to</p> <p>3 the, the exigencies that would allow your Honor to</p> <p>4 issue a TRO. So the first is that the 3-judge panel</p> <p>5 statutes are venue statutes. They're not</p> <p>6 jurisdictional statutes. Stevenson versus Bartlett</p> <p>7 teaches us that 1-267 is a venue statute, not a</p> <p>8 jurisdictional statute. So we have sought venue in</p> <p>9 this court under 1-77 based on the fact that the</p> <p>10 legislation was enacted here in Raleigh.</p> <p>11 If the State wants to make a motion to</p> <p>12 transfer venue or if this Court finds that, that</p> <p>13 venue is more appropriate in front of a 3-judge</p> <p>14 panel, that, that transferring venue is, is an</p> <p>15 option this Court has, but the Court of Appeals says</p> <p>16 that that, that a TRO takes precedence over that</p> <p>17 venue issue. So it's, so the first thing I want to</p> <p>18 clarify is it's not a question of jurisdiction.</p> <p>19 It's simply a question of, of venue, which gets</p> <p>20 addressed after a TRO.</p> <p>21 THE COURT: However, based upon that statute</p> <p>22 this Court could not declare sitting alone that</p> <p>23 this, this statute is unconstitutional.</p> <p>24 MR. ERTESCHIK: And that is the second</p> <p>25 doctrinal reason, your Honor. Your Honor has honed</p>

<p style="text-align: right;">Page 10</p> <p>1 in on that as well. So that, that issue the Supreme 2 Court addressed in the Town of Boone decision last 3 year in its November 10, 2015, order. That, that 4 issue is this, that the statute is only triggered by 5 a finding that the act is unconstitutional. And 6 that is not what we're asking the Court to find. 7 THE COURT: I understand that. 8 MR. ERTESCHIK: We are simply asking the 9 Court to find that we have a likelihood of success 10 on the merits. So your Honor, for, for the reasons 11 of exigencies that, that your Honor has honed in on 12 and those two doctrinal reasons, there is simply no 13 impediment to the Court issuing a TRO. And in fact, 14 your Honor, it, it would, the Court has more than 15 sufficient inherent authority to do so. 16 THE COURT: Okay. 17 MR. ERTESCHIK: Thank you, your Honor. 18 THE COURT: Mr. Majmundar, is he right or 19 wrong? And if he's wrong, why? 20 MR. MAJMUNDAR: Well, your Honor -- 21 THE COURT: And always take great care 22 telling the Court they can't do something, you know. 23 It's just, that's just a bad way to start off. 24 MR. MAJMUNDAR: Yeah. 25 THE COURT: Usually.</p>	<p style="text-align: right;">Page 12</p> <p>1 coming. 2 MR. MAJMUNDAR: That's right. I try not to 3 do that too often, your Honor. But under 267.1 the 4 3-judge panel has the authority to make decisions 5 based on the facial constitutionality -- 6 THE COURT: Sure. 7 MR. MAJMUNDAR: -- of the statute. In order 8 to, in order to render a TRO, this Court would be 9 responsible for making determination of the 10 likelihood of Plaintiffs prevailing on the merits, 11 which tends to infringe on the 3-judge panel's 12 opinion of deciding whether something is or is not 13 constitutional. It's -- this is very gray. There 14 is obviously no case law to suggest -- 15 THE COURT: Well, I mean, and tell me. What 16 would keep the Chief Justice from taking my letter 17 of notice to him, which is routine? I mean this is 18 not the first time we've had a constitutional 19 challenge in 3-judge panel. We do it all the time. 20 What would keep the Chief Justice from taking 21 my notice and just deciding that he's not in any big 22 hurry to appoint a panel? The panel has a hard time 23 scheduling when they can all meet, and then before 24 long it's three, four months down the road, and no 25 decision has been made by anything. And this is a</p>
<p style="text-align: right;">Page 11</p> <p>1 MR. MAJMUNDAR: I wouldn't dream of -- 2 THE COURT: If you had, if I had no 3 inclination of doing anything, it just piques my 4 interest when someone says I can't do it. 5 MR. MAJMUNDAR: I understand, your Honor. 6 THE COURT: All right. 7 MR. MAJMUNDAR: I think your interest was 8 piqued by the question of whether this Court can in 9 fact -- 10 THE COURT: Sure. 11 MR. MAJMUNDAR: -- pass judgement. 12 THE COURT: I mean it's, that's the, the 13 significant question that for which we have actually 14 no authority, direct authority anyway, under this 15 same type of facts scenario, but maybe after this 16 case we will. 17 MR. MAJMUNDAR: And that's, that's a 18 possibility, your Honor. One of the aspects, and 19 we've only had the complaint for a few hours -- 20 THE COURT: Sure. 21 MR. MAJMUNDAR: -- to digest, but one of the 22 aspects -- 23 THE COURT: Well, I mean it's not like you 24 didn't know it was coming. I mean my goodness, if 25 you read the News & Observer, you'd know it's</p>	<p style="text-align: right;">Page 13</p> <p>1 statute that may be, significantly likely to be, 2 unconstitutional on its face. 3 I mean what happens in the middle of all that 4 void? And why -- and that's, well, the first 5 question. The second question is in terms of the 6 immediacy of this law taking effect. What is the 7 immediacy of this law needing to take effect from 8 the interest of the people of North Carolina and the 9 State of North Carolina? What is it about that, 10 this law? 11 It will change dramatically the whole concept 12 of how education is handled. And if it turns out 13 the legislature got it wrong and we find out 6, 8, 14 9, 10, 12 months later, just think about the 15 disruption that that would cause. What is it that 16 is so important about having this law put into 17 effect on January the 1st of 2017? 18 MR. MAJMUNDAR: As to your first question, 19 the General Assembly was silent as to what to do in 20 these circumstance of -- situation, factual 21 situation. 22 THE COURT: Sure. 23 MR. MAJMUNDAR: And so we can only infer from 24 what the General Assembly did say and what they 25 meant and who, which court would be responsible for</p>

<p style="text-align: right;">Page 14</p> <p>1 making the determinations, the facial determinations 2 of the constitutionality of the statute. It's not 3 to suggest this Court doesn't have dominion over an 4 exigent circumstance. 5 THE COURT: Sure. 6 MR. MAJMUNDAR: It's just silent to, to that 7 point, your Honor. 8 THE COURT: And historically courts have 9 always had that inherent authority to, you know, 10 keep the status quo unchanged until the important 11 legal issues can be resolved so that neither side 12 gets hurt, diminish the potential for harm until, 13 until the legal questions get resolved. Where would 14 be the harm? 15 MR. MAJMUNDAR: Well, and in that respect, 16 your Honor, and again this, you know, we've not had 17 a chance to discuss this -- 18 THE COURT: Okay. 19 MR. MAJMUNDAR: -- with the General Assembly, 20 but I think the HB 17, this portion of HB 17 is the 21 General Assembly's attempt to clarify; and in fact, 22 that's what the act is called, to clarify the, the 23 role of the Superintendent -- 24 THE COURT: It did not appear to me to be 25 confusing. But what, what was the necessity for</p>	<p style="text-align: right;">Page 16</p> <p>1 face of the constitution? 2 MR. MAJMUNDAR: I believe that's true, your 3 Honor. 4 THE COURT: And it's the face of the 5 constitution and the ambiguities on the face of the 6 constitution that somehow or another we just 7 discovered this issue. 8 MR. MAJMUNDAR: Yes, Judge. 9 THE COURT: Okay. So do you agree or 10 disagree that I have the authority to do anything? 11 MR. MAJMUNDAR: I believe, your Honor, you 12 have the authority to do things. I'm only bringing 13 to the Court's attention there is some tension with 14 respect to the way the statute is written and the 15 purpose of the statute -- 16 THE COURT: All right. 17 MR. MAJMUNDAR: -- versus the exigent 18 circumstances. 19 THE COURT: Okay. So do I have the authority 20 to enter a temporary restraining order if they 21 impress me to the point that they convince me that 22 there is a, there's a reasonable possibility or 23 likelihood of prevailing on the merits and that 24 there could be irreparable harm if the, if this 25 particular statute was put into effect and</p>
<p style="text-align: right;">Page 15</p> <p>1 clarification? 2 MR. MAJMUNDAR: Well, that, that's a question 3 I think that, you know, as litigation goes 4 forward -- 5 THE COURT: When did it arise? I wonder 6 when, what, when the confusion, when the ambiguity 7 arose. Could it have been late on the evening of 8 November the 8th or 9th or something like that? Is 9 that when the ambiguity arose? 10 MR. MAJMUNDAR: It's possible, your Honor. 11 It could have been prior to that. There is actually 12 a prior case. In fact, Justice Orr was involved in 13 the case of Superintendent Atkinson -- 14 THE COURT: Sure. 15 MR. MAJMUNDAR: -- which there was a question 16 about the constitutionality of the, the role of the 17 Superintendent, what powers the Superintendent has, 18 some questions as to what role the Board of 19 Education plays in terms of our state's educational 20 system. 21 THE COURT: Which have never been resolved by 22 appellate courts. 23 MR. MAJMUNDAR: Not, not together. I 24 don't -- 25 THE COURT: Shall we go back and look at the</p>	<p style="text-align: right;">Page 17</p> <p>1 implemented immediately? 2 MR. MAJMUNDAR: I agree, your Honor, that the 3 concept and purpose of a temporary restraining order 4 to prevent a harm is not compatible with the way 5 1-267.1 is set up. 6 THE COURT: Okay. Well, even if I can do 7 that for 10 days, I guess we'll have this same 8 conversation next week on I assume a motion for 9 preliminary injunction. 10 MR. ERTESCHIK: Well, your Honor, I'm glad 11 to, to address that. So we have a motion for 12 preliminary injunction in our complaint as -- 13 THE COURT: Well, I mean that's just in your 14 complaint. You know, in terms of preliminary 15 affairs, I mean it's something, I don't normally 16 convert a TRO into a motion for preliminary 17 injunction -- 18 MR. ERTESCHIK: Oh -- 19 THE COURT: -- unless the other side comes in 20 and says we're ready to be heard. And I, I don't 21 get that -- 22 MR. ERTESCHIK: Right. 23 THE COURT: -- I don't get that feeling today 24 from the, these folks who just got summoned down 25 here to, you know, be heard, so.</p>

<p style="text-align: right;">Page 18</p> <p>1 MR. ERTESCHIK: Certainly, your Honor --</p> <p>2 THE COURT: But I mean not --</p> <p>3 MR. ERTESCHIK: -- we're not have asking for</p> <p>4 that.</p> <p>5 THE COURT: So I'm going to be asking the</p> <p>6 same questions on the preliminary injunction because</p> <p>7 at that point this Court may have to declare</p> <p>8 something with reference to the nature of the</p> <p>9 statute, the nature of the likelihood of success,</p> <p>10 that it comes close to making some kind of</p> <p>11 declaration about the constitutionality of it.</p> <p>12 MR. ERTESCHIK: And, and, your Honor, it, it</p> <p>13 seems to us that in this Court's inherent authority,</p> <p>14 for the same reasons that the Court is able to issue</p> <p>15 a TRO, that it makes sense to, if the Court is</p> <p>16 inclined, to, to grant our motion for TRO, to have</p> <p>17 that TRO last until a 3-judge panel be impaneled.</p> <p>18 THE COURT: I don't have any authority to do</p> <p>19 that.</p> <p>20 MR. ERTESCHIK: Well, your Honor, the</p> <p>21 alternative I think is to come back, to come back</p> <p>22 here in 10 days --</p> <p>23 THE COURT: When they're better prepared to</p> <p>24 argue this.</p> <p>25 MR. ERTESCHIK: And, and we certainly could</p>	<p style="text-align: right;">Page 20</p> <p>1 And I mean who knows how long that would take</p> <p>2 at, all while the state government is trying to</p> <p>3 operate, and the two departments are at odds with</p> <p>4 who should be doing what. Not the best way to</p> <p>5 operate a business, and certainly not the best way</p> <p>6 to operate a government.</p> <p>7 But, so let's, but anyway, the purpose of my</p> <p>8 comment was that whatever I do is for a short period</p> <p>9 of time, and it's only subject to review by a</p> <p>10 3-judge panel, and after they convene they may</p> <p>11 strike my order completely. And that's certainly</p> <p>12 their prerogative.</p> <p>13 Why don't I hear the, why don't I hear your</p> <p>14 contention of what you believe the merits would show</p> <p>15 and why you are likely to prevail and why you</p> <p>16 contend that there will be irreparable harm if this</p> <p>17 law is put into immediate effect. And then I'll</p> <p>18 hear y'all's response to that. Judge Orr.</p> <p>19 MR. ORR: Thank you, your Honor. And thank</p> <p>20 you for being willing to hear this on short notice,</p> <p>21 you and your staff.</p> <p>22 THE COURT: I know, that's what we do.</p> <p>23 MR. ORR: We appreciate that.</p> <p>24 THE COURT: That's why I did that. Yes, sir.</p> <p>25 MR. ORR: Mindful of your admonition to be</p>
<p style="text-align: right;">Page 19</p> <p>1 do that.</p> <p>2 THE COURT: Okay.</p> <p>3 MR. ERTESCHIK: We could have this same</p> <p>4 discussion.</p> <p>5 THE COURT: Well, we may. In the absence of</p> <p>6 their consent, I, we, I suspect that's the best you</p> <p>7 can do. Okay. I mean, you know, in fairness.</p> <p>8 MR. ERTESCHIK: And, and we would be fine</p> <p>9 with that, your Honor.</p> <p>10 THE COURT: Okay. Let me -- and you also say</p> <p>11 that whatever I do or fail to do is subject to</p> <p>12 review by the 3-judge panel. If I enter any type of</p> <p>13 injunctive relief, it's still subject to review by</p> <p>14 the 3-judge panel that will ultimately decide the</p> <p>15 issue. And then if they find the statute</p> <p>16 constitutional, they will dismiss this lawsuit. If</p> <p>17 they find it unconstitutional, then that can</p> <p>18 determine whether or not they will issue any kind of</p> <p>19 injunctive relief pending appellate review.</p> <p>20 Of course, I don't know where the appellate</p> <p>21 review goes now. I assume it works its way up</p> <p>22 through the 3-judge panel of the Court of Appeals</p> <p>23 and then maybe en banc review by the Court of</p> <p>24 Appeals and then ultimately maybe to the Supreme</p> <p>25 Court.</p>	<p style="text-align: right;">Page 21</p> <p>1 succinct.</p> <p>2 THE COURT: Sure.</p> <p>3 MR. ORR: This is a very straightforward</p> <p>4 constitutional challenge. It is the position as</p> <p>5 articulated in our declaratory judgment complaint</p> <p>6 that the Constitution of North Carolina delegates</p> <p>7 three very specific constitutional powers to the</p> <p>8 State Board of Education, which is a constitutional</p> <p>9 body. And those are to administer, to supervise the</p> <p>10 free public school system of the state, and to</p> <p>11 supervise the financial resources, the operation of</p> <p>12 the public school system of our state. And these</p> <p>13 constitutional powers have been placed since 1868.</p> <p>14 And probably the single clearest place to</p> <p>15 call the Court's attention is Page 2 of the</p> <p>16 complaint where the two comparative boxes are one</p> <p>17 showing Article IX, Section 5 of the Constitution</p> <p>18 which says, "It shall be the duty of the State Board</p> <p>19 of Education to supervise and administer the free</p> <p>20 public school system." And juxtapose that with the</p> <p>21 portion of Session Law 2016-126, Section 4 which</p> <p>22 says, "It shall now" -- and I'm adding in "now"</p> <p>23 because in the legislation it strikes out the term</p> <p>24 the "State Board of Education" and puts in its place</p> <p>25 that "the Superintendent of Public Instruction is to</p>

<p style="text-align: right;">Page 22</p> <p>1 have under his or her direction and control all 2 matters relating to the direct supervision and 3 administration of the public school system." 4 If that is not a direct attempt to transfer 5 the constitutional powers delegated exclusively to 6 the State Board of Education, I don't know what 7 does. And while the statute is comprehensive in a 8 number of ways, it is pointedly specific in its 9 intent and attempt to transfer what have 10 historically and are the constitutional powers of 11 the State Board of Education to the newly elected 12 Superintendent of Public Instruction who will take 13 office on January 1st, the effective date of this 14 legislation. 15 In a nutshell, that's what this case is 16 about, your Honor. I'm happy to answer any 17 questions. Mr. Erteschik will talk about the 18 irreparable harm, but that is the core of our 19 constitutional claim in this declaratory judgment 20 action. 21 THE COURT: Well, tell me, under the 22 constitution what do you contend is as clear from 23 the language of the constitution? I'm reading 24 Section 8 of Article IX. It says the Superintendent 25 of Public Instruction is a member of the Board and</p>	<p style="text-align: right;">Page 24</p> <p>1 MR. ORR: -- the irreparable harm when you're 2 ready. 3 THE COURT: Let me talk about, let me see, 4 let me talk -- just a moment. Still got to decide 5 you're right. 6 MR. ORR: Sure. 7 THE COURT: I see a lot of these challenges, 8 alleged unconstitutional passages. Most of them, 9 when you look at them it's clear on their face 10 there's no basis to it at all, period. Period. 11 Someone just trying to make a statement, trying to 12 make a point, trying to show objection, but they 13 don't have any place in a, in a court. 14 I don't see any ambiguity here. I don't know 15 why all of a sudden one arose, and I don't know how 16 it arose or where in the constitution that something 17 would suggest that it arose. Can you help me 18 understand this? 19 MR. MAJMUNDAR: I'll try, your Honor. The, 20 the constitution does vest the Board of Education 21 with authority, but the extent of the authority is 22 subject to the laws in the General Assembly. The 23 General Assembly has its own constitution. 24 THE COURT: Where? 25 MR. MAJMUNDAR: In Article IX, Section 5.</p>
<p style="text-align: right;">Page 23</p> <p>1 is Secretary of the Board. And then that was under 2 the 1868 Constitution. And then later under the 3 revised constitution, Section 4, Superintendent, 4 Superintendent of Public Instruction is the 5 Secretary and Chief Administrative Officer of the 6 State Board of Education. And you note that he's 7 not a voting member. 8 MR. ORR: Right. 9 THE COURT: What is the constitutional role 10 of the Superintendent? 11 MR. ORR: I think the constitutional role is 12 limited to the two specific provisions that you just 13 articulated. 14 THE COURT: He's the Secretary and Chief 15 Administrative Officer of the Board? 16 MR. ORR: That's correct, your Honor. 17 THE COURT: Follow the instruction and 18 policies set by the Board. 19 MR. ORR: That's correct. And nothing else, 20 your Honor. 21 THE COURT: Okay. Well, let's see if we can 22 figure out where the ambiguity lies. Okay. Thank 23 you. 24 MR. ORR: And Mr. Erteschik will talk to -- 25 THE COURT: Let me --</p>	<p style="text-align: right;">Page 25</p> <p>1 THE COURT: Wait a minute. Okay. Go ahead. 2 MR. MAJMUNDAR: And so the powers and the 3 duties of the Board under Section 5 are delineated. 4 That's true, but the catchall, the caveat to that is 5 subject to the laws in the General Assembly. 6 THE COURT: Wait a minute. Let me read, read 7 Section 5 again. Just give me a minute. 8 All right. State Board of Education shall 9 supervise and administer the free public school 10 system and the educational funds provided for its 11 support, except the funds mentioned in Section 7 of 12 this article, and shall make all needed rules and 13 regulations in reference, in relation thereto 14 subject to laws enacted by the General Assembly. 15 Can the General Assembly enact laws that are 16 contrary to the language of the constitution? 17 MR. MAJMUNDAR: I do not believe they can, 18 your Honor. Well, they can enact laws, but they can 19 be stricken. 20 THE COURT: I don't think they can either. 21 It seems to me that this article suggests that, that 22 the Board shall administer and supervise and shall 23 make rules and regulations consistent with their 24 mandate under the constitution, which would be 25 subject to the laws of the General Assembly, but the</p>

<p style="text-align: right;">Page 26</p> <p>1 Assembly, General Assembly cannot take away their 2 constitutional mandates. 3 MR. MAJMUNDAR: I do not believe the General 4 Assembly can do that, your Honor. 5 THE COURT: Okay. What have they done? 6 MR. MAJMUNDAR: I think, your Honor, and in 7 keeping with Judge Hobgood's decision a number of 8 years ago that Justice Orr knows about, 9 Superintendent, the person, the Superintendent has 10 invested in that power, in that authority, 11 constitutional authority in that position. And I 12 think without having actually -- 13 THE COURT: What is the, what is his 14 constitutional authority? I mean he, we do know 15 that he is Secretary to the Board and that he's 16 the -- the language -- the Chief Administrative 17 Officer of the Board. What does that mean? 18 MR. MAJMUNDAR: I think that contemplates the 19 day-to-day administration of education in this 20 state. 21 THE COURT: Subject to the policies and 22 decisions of the Board? 23 MR. MAJMUNDAR: I don't believe that's -- I 24 think that's a consistent interpretation, your 25 Honor.</p>	<p style="text-align: right;">Page 28</p> <p>1 Why is -- these are two entities recognized 2 by the constitution. Why are, where is the 3 ambiguity? It appears that this, this statute has 4 turned over all responsibilities currently existing 5 with the Board to that Superintendent. What's -- if 6 this statute is constitutional, what is it the Board 7 will do now? 8 MR. MAJMUNDAR: Grant -- 9 THE COURT: And, and how, and what extent 10 could they, if they can do nothing, enforce it? 11 MR. MAJMUNDAR: According to the plain 12 reading of the statute now, it seems to suggest that 13 the Board will be responsible for promulgating and 14 enacting rules associated with the, the state's 15 education system; so the actual rule-making 16 procedures associated with, for instance, the EPA, 17 complying with the EPA or passing the policies as 18 sometimes the Board is want to do. 19 According to the plain meaning of the 20 statute, the Board's role is that provision, to 21 enact the rules and regulations, which does in many 22 ways correspond with Section 5 of Article IX, to 23 make all needed rules and regulations thereto. And 24 so when the General Assembly modifies the pertinent 25 statutes through HB 17, it's identifying to make all</p>
<p style="text-align: right;">Page 27</p> <p>1 THE COURT: That's what? 2 MR. MAJMUNDAR: It's a consistent 3 interpretation. The Superintendent by virtue of 4 that office has the authority to constitutional 5 mandate to go ahead and provide for the day-to-day 6 operations of our state school system. In keeping 7 with that constitutional authority, the General 8 Assembly here with HB 17, as far as I understand, 9 seems to be clarifying that role of the 10 Superintendent, which presumably the General 11 Assembly had believed has always existed. Why 12 there's an ambiguity now is a question you've asked 13 a couple times. I'm not sure why the ambiguity 14 became apparent here. 15 THE COURT: I, I'm having a hard time finding 16 ambiguity. That's what my, that's my hang-up. 17 MR. MAJMUNDAR: I understand, your Honor. 18 THE COURT: Well, I mean it's like, okay, you 19 have a Board that, that makes decisions with 20 reference to funding, policy, and everything for 21 education in this state. You have a Superintendent 22 that is the sole Chief Operating Officer of the 23 Board and that operates as a Secretary, the Chief 24 Administrative Officer, and carries out the policies 25 and dictates of the Board.</p>	<p style="text-align: right;">Page 29</p> <p>1 needed rules and regulations as being the authority 2 of the Board of Education. 3 THE COURT: So that's what it means when the 4 constitution says, "It shall be the duty of the 5 State Board of Education to supervise and administer 6 the free public school system"? Is that what that 7 means? The Board will now make rules and 8 regulations? 9 MR. MAJMUNDAR: That's way, your Honor, 10 that's the, the statute says. Its plain meaning is 11 that they make the rules and regulations. 12 THE COURT: Okay. All right. All right. 13 Thank you. 14 You tell me why you, you believe that I 15 should not allow this temporary restraining order 16 even if I find that there, there is likely to be a 17 successful constitutional challenge to this statute. 18 I assume you contend that there would be no 19 immediate harm, irreparable harm that would require 20 this Court to intervene and enjoin the effective 21 date of the implementation of the statute. 22 MR. MAJMUNDAR: This is a first-blush review 23 of the complaint, your Honor. There are a couple 24 points that we thought we would at least bring to 25 the Court's attention.</p>

<p style="text-align: right;">Page 30</p> <p>1 THE COURT: Okay.</p> <p>2 MR. MAJMANDAR: One is a jurisdictional</p> <p>3 issue, not a 267.1 issue, but whether or not this</p> <p>4 Court has jurisdiction over declaratory judgment</p> <p>5 that, declaratory judgment act over the State of</p> <p>6 North Carolina, whether we waive sovereign immunity</p> <p>7 for the purposes of this action. The complaint</p> <p>8 features no allegations suggesting such a waiver.</p> <p>9 And according to the Petroleum Traders case, unless</p> <p>10 it is a claim brought under the declaration of</p> <p>11 rights of the constitution, this Court doesn't have</p> <p>12 jurisdiction over the State. And that's a personal</p> <p>13 jurisdiction issue.</p> <p>14 THE COURT: So you're saying core pleading?</p> <p>15 MR. MAJMANDAR: Okay. I think the pleading</p> <p>16 doesn't necessarily set out what needs to be set out</p> <p>17 for there to be an expression of a waiver of</p> <p>18 sovereign immunity. I don't think their</p> <p>19 allegation --</p> <p>20 THE COURT: So the State has to waive</p> <p>21 sovereign immunity for an agency or citizen to</p> <p>22 challenge the constitutionality of a statute that is</p> <p>23 arguably unconstitutional on its face?</p> <p>24 MR. MAJMANDAR: According to the Supreme</p> <p>25 Court in Petroleum Traders, the State has not waived</p>	<p style="text-align: right;">Page 32</p> <p>1 MR. MAJMANDAR: Judge Hobgood, your Honor.</p> <p>2 THE COURT: Which was not available?</p> <p>3 MR. MAJMANDAR: It was not.</p> <p>4 THE COURT: Stands, it's the law of that</p> <p>5 case. It stands for that case. It's not binding on</p> <p>6 this court, and it's not binding on the, any other</p> <p>7 court.</p> <p>8 MR. MAJMANDAR: That's true, your Honor. I</p> <p>9 don't disagree with you.</p> <p>10 THE COURT: So it's like one of those</p> <p>11 unpublished opinions of the Court of Appeals. You</p> <p>12 know it's there, but it's not precedent for</p> <p>13 anything, and it may be instructive or not.</p> <p>14 MR. MAJMANDAR: Finally, your Honor, with</p> <p>15 respect to a TRO, there's a balancing of the</p> <p>16 equities. The --</p> <p>17 THE COURT: Balance them for me.</p> <p>18 MR. MAJMANDAR: The prevention of a newly</p> <p>19 enacted statute signed by the government is I think</p> <p>20 part and parcel harm to the State of North Carolina.</p> <p>21 This is a --</p> <p>22 THE COURT: Can you --</p> <p>23 MR. MAJMANDAR: The General Assembly speaks</p> <p>24 for the people.</p> <p>25 THE COURT: Okay. Can you pragmatically</p>
<p style="text-align: right;">Page 31</p> <p>1 its sovereign immunity.</p> <p>2 THE COURT: Okay.</p> <p>3 MR. MAJMANDAR: So that's a jurisdictional</p> <p>4 issue. With respect to the likelihood of success,</p> <p>5 and it's not really taking a position, but Judge</p> <p>6 Hobgood found a contrary position than what is being</p> <p>7 espoused today by Plaintiffs. And I'm not sure from</p> <p>8 the face of the complaint we've seen anything from</p> <p>9 Plaintiffs to suggest that they have met their</p> <p>10 burden, which it's their burden, that they will, in</p> <p>11 fact, prevail on the merits.</p> <p>12 And there's a lot of allegations. There's a</p> <p>13 lot of speculations what the harm would be, but I'm</p> <p>14 not sure there's anything in the complaint other</p> <p>15 than the suggestion that it must be wrong; the</p> <p>16 General Assembly must have gotten it wrong because</p> <p>17 they didn't appreciate the, the constitutional</p> <p>18 authority of the Board of Education.</p> <p>19 So there is a question as to who and where</p> <p>20 the constitutional authority lies with respect to</p> <p>21 the education system of this state, at least in</p> <p>22 previous instances with the Atkinson v. State case.</p> <p>23 And finally, your Honor --</p> <p>24 THE COURT: Who is, what judge made that</p> <p>25 determination?</p>	<p style="text-align: right;">Page 33</p> <p>1 explain that harm to me?</p> <p>2 MR. MAJMANDAR: It is a role of the General</p> <p>3 Assembly to promulgate these statutes. It's the</p> <p>4 role of the governor to approve or disapprove. And</p> <p>5 anytime a Court impedes upon the ability of the</p> <p>6 General Assembly and the government to do that, then</p> <p>7 there's a potential separation of powers issue.</p> <p>8 THE COURT: Well, suppose I had passed the</p> <p>9 statute that terminated the State Board of Education</p> <p>10 in its entirety and transferred all of its authority</p> <p>11 to the Superintendent.</p> <p>12 MR. MAJMANDAR: Is your --</p> <p>13 THE COURT: Does that same rule apply?</p> <p>14 MR. MAJMANDAR: Well, I think the rule</p> <p>15 applies, but the question is weighing the harm to</p> <p>16 the State's ability to pass laws versus the harm</p> <p>17 that is inflicted to the other side. I think the</p> <p>18 harm exists. The question is whether it's</p> <p>19 outweighed by the harm to the other side.</p> <p>20 THE COURT: Well, actually the practical</p> <p>21 effect is just that, isn't it? The practical effect</p> <p>22 of this law if it goes into effect is just what I</p> <p>23 said, isn't it?</p> <p>24 MR. MAJMANDAR: I believe that's the position</p> <p>25 Plaintiffs have espoused today.</p>

<p style="text-align: right;">Page 34</p> <p>1 THE COURT: Okay. And that's a fairly easy</p> <p>2 balancing test, wouldn't it? A theoretical harm to</p> <p>3 the State and a real, practical harm to an agency</p> <p>4 that's constitutionally mandated to care for, care</p> <p>5 for the public school children of the state.</p> <p>6 MR. MAJMUNDAR: Yes, sir.</p> <p>7 THE COURT: So we're going to balance the</p> <p>8 harm to the public school children of this state</p> <p>9 based upon potential harm to them or the theoretical</p> <p>10 harm that the, would be caused by a declaration</p> <p>11 that, a potential declaration that the legislature</p> <p>12 built a bridge too far.</p> <p>13 MR. MAJMUNDAR: That is the balancing test,</p> <p>14 your Honor. I would draw your attention to Page 12</p> <p>15 of the complaint.</p> <p>16 THE COURT: All right.</p> <p>17 MR. MAJMUNDAR: The damages cited by</p> <p>18 Plaintiffs on Page 12 relate to uncertainties</p> <p>19 associated with the making this portion of the</p> <p>20 statutes effective. There is no firm, fixed</p> <p>21 identifiable harm, but what might happen. And the</p> <p>22 Court of Appeals has said, you know, illusory-type</p> <p>23 damages are not sufficient with the TRO standards.</p> <p>24 THE COURT: Well, sometimes when you close</p> <p>25 down an agency, it is almost impossible to quantify</p>	<p style="text-align: right;">Page 36</p> <p>1 come.</p> <p>2 So in fairness I believe, I am going to</p> <p>3 determine that there is, that I do have the inherent</p> <p>4 authority to exercise injunctive relief in this</p> <p>5 matter pending further review by a 3-judge panel of</p> <p>6 superior court judges who, which panel will evaluate</p> <p>7 the constitutional claims and challenges, but I do</p> <p>8 have the authority in the interim to order that this</p> <p>9 statute not be implemented, not be enforced, not be</p> <p>10 put into effect until those constitutional</p> <p>11 challenges are presented to a 3-judge panel or until</p> <p>12 the Defendants can be heard further in objection to</p> <p>13 the motion for preliminary injunction.</p> <p>14 We can set it for next week as far as I know.</p> <p>15 I mean can you do it Friday? Is that enough time</p> <p>16 for everybody? Y'all got a calendar to look at, see</p> <p>17 what your calendars look like?</p> <p>18 MR. ORR: And Friday would be fine. We have</p> <p>19 a draft proposed order --</p> <p>20 THE COURT: Okay.</p> <p>21 MR. ORR: -- if your Honor would like to look</p> <p>22 at it.</p> <p>23 THE COURT: Sure, I would. I would.</p> <p>24 MR. ORR: Approach?</p> <p>25 THE COURT: Would that be sufficient time for</p>
<p style="text-align: right;">Page 35</p> <p>1 the impact of that event. Maybe that's what they</p> <p>2 meant.</p> <p>3 MR. MAJMUNDAR: It's possible, your Honor.</p> <p>4 I'm sure that we'd like an answer to that question.</p> <p>5 THE COURT: All right.</p> <p>6 MR. MAJMUNDAR: I'm glad to answer any</p> <p>7 questions if you have any.</p> <p>8 THE COURT: Not picking on you, but you're</p> <p>9 the one standing.</p> <p>10 MR. MAJMUNDAR: I understand.</p> <p>11 THE COURT: Appreciate you being here.</p> <p>12 I don't think the State will be harmed for 10</p> <p>13 days, so I'll hear you. That's a more important</p> <p>14 question next week on your motion for preliminary</p> <p>15 injunction. Okay. I think at that time maybe</p> <p>16 you'll have a better insight on answering that</p> <p>17 question.</p> <p>18 In fairness, maybe the State will have a</p> <p>19 better opportunity of assessing that as well and</p> <p>20 have a better opportunity to address anything else</p> <p>21 in the constitutional context so that these</p> <p>22 attorneys can confer with people who are responsible</p> <p>23 for drafting this legislation to understand the</p> <p>24 ambiguities they saw, and they may be in a better</p> <p>25 position to articulate those next week when they</p>	<p style="text-align: right;">Page 37</p> <p>1 y'all --</p> <p>2 MR. MAJMUNDAR: Yes, your Honor.</p> <p>3 THE COURT: -- to confer, be prepared to file</p> <p>4 any additional pleading with the Court, and address</p> <p>5 these issues further as necessary? And then we'll</p> <p>6 hear you with regard to everything we talked about</p> <p>7 today.</p> <p>8 If anybody can find any additional precedent</p> <p>9 with reference to the power of this Court to enter</p> <p>10 not a temporary restraining order, but a preliminary</p> <p>11 injunction; and if the Court does enter a</p> <p>12 preliminary injunction, whether or not the Court has</p> <p>13 the authority to make any declarations with</p> <p>14 reference to constitutionality of this statute that</p> <p>15 would be enforceable. I don't want to overstep my</p> <p>16 authority. So I'll hear further from y'all next</p> <p>17 week. Let me, just have a seat y'all. Let me look</p> <p>18 at, let me look at your order.</p> <p>19 All right. The language is sufficient for,</p> <p>20 for a TRO. I probably will be a little more</p> <p>21 particular about language in a preliminary</p> <p>22 injunction if I were to consider a preliminary</p> <p>23 injunction. Again, all of this, these orders are</p> <p>24 subject to review, modification, or vacation by a</p> <p>25 3-judge panel appointed by the Chief Justice that is</p>


<p style="text-align: right;">Page 38</p> <p>1 assigned to address this case and these issues in 2 the event one is appointed next week and convenes 3 and prior to the, the date set for this preliminary, 4 preliminary injunction hearing and takes some 5 action. And I will make sure that they, the Court 6 recognizes that they have full jurisdiction over the 7 issues, all issues. 8 So I will allow a motion for temporary 9 restraining order. I will enjoin and restrain the 10 implementation of this legislation. It will not be 11 put into effect until further order of this Court. 12 The Court sets the motion for preliminary injunction 13 to be heard before myself on next Friday, looks like 14 January the 6th or soon thereafter as the Court 15 directs. 9:30. Anything further? All right. 16 Thank you, gentlemen. 17 MR. ORR: Thank you, your Honor. 18 MR. MAJMUNDAR: Thank you. 19 THE COURT: We'll be adjourned. 20 (End of recording.) 21 22 23 24 25</p>	
<p style="text-align: right;">Page 39</p> <p>1 STATE OF NORTH CAROLINA 2 COUNTY OF WAKE 3 4 REPORTER'S CERTIFICATE 5 I, LAUREN M. MCINTEE, Registered Professional 6 Reporter and Notary Public for the State of North 7 Carolina, certify that I was authorized to and did 8 stenographically transcribe the foregoing proceeding 9 from a video recording, and that the transcript is a 10 true and accurate record of the testimony to the best of 11 my ability. 12 I further certify that I am not a relative, 13 employee, attorney, or counsel of any of the parties, 14 nor am I a relative or employee of any of the parties' 15 attorneys or counsels connected with the action, nor am 16 I financially interested in the action. 17 18 Dated this 3rd day of January, 2017. 19  20 LAUREN MCINTEE, RPR, Notary Public 21 Notary Number: 201616600044 22 23 24 25</p>	

Exhibit E

FILED

NORTH CAROLINA

WAKE COUNTY

2016 DEC 29 PM 3: 54

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16-CVS-15607

NORTH CAROLINA STATE BOARD OF EDUCATION,

WAKE COUNTY, C.S.C.
BY AS

Plaintiff,

v.

THE STATE OF NORTH CAROLINA,

Defendant.

TEMPORARY RESTRAINING ORDER

THIS MATTER is before the Court on the Plaintiff North Carolina State Board of Education's motion for temporary restraining order.

The Court has considered the verified complaint and the arguments and submissions of counsel in attendance at the hearing on this motion. The Board's counsel were present at the hearing, and advised the Court that they had given the Defendant, the State of North Carolina, notice of the Board's intent to seek a temporary restraining order. The State's counsel were present at the hearing.

IT APPEARS to the Court that good cause exists to grant the motion.

First, the Board has shown that it is likely to succeed on the merits. It is well-settled that when a constitution expressly confers certain powers and duties on an entity, those powers and duties cannot be transferred to someone else without a constitutional amendment. Article IX, Section 5 of the North Carolina Constitution expressly confers certain "powers and duties" on the Board. Those constitutional powers and duties include:

- the power and duty to "supervise . . . the free public school system";
- the power and duty to "administer the free public school system";

- the power and duty to “supervise . . . the educational funds provided for [the free public school system’s] support”; and
- the power and duty to “administer . . . the educational funds provided for [the free public school system’s] support.”

The provisions of Session Law 2016-126 challenged in the verified complaint (hereinafter “the Transfer Legislation”) attempt to transfer these constitutional powers and duties, however, from the Board to the Superintendent of Public Instruction. Thus, the Board is likely to succeed on the merits of its claims that the Transfer Legislation is unconstitutional.

Second, the Transfer Legislation will cause irreparable harm if not immediately enjoined. As a matter of law, violations of the North Carolina Constitution constitute *per se* irreparable harm. As described above, the Board is likely to succeed on the merits of its claims that the Transfer Legislation is unconstitutional. Therefore, no further showing of irreparable harm is required. Even if a further showing of irreparable harm were required, moreover, the Transfer Legislation threatens to cause irreparable harm to the Board, the employees of the public school system, and—most importantly—North Carolina’s 1.5 million public school students unless the status quo is preserved. Thus, there is sufficient irreparable harm to warrant immediate injunctive relief.

Third, the balance of equities also favors granting immediate injunctive relief. As described above, without immediate injunctive relief, the Transfer Legislation will cause irreparable harm. Conversely, immediate injunctive relief will not result in any harm. The Board has exercised its constitutional powers and fulfilled its constitutional duties for the past 148 years. Allowing the Board to continue doing so while this case is resolved only preserves this longstanding status quo.

WHEREFORE, the Board's motion for temporary restraining order is **GRANTED**.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that until a decision on the Board's motion for preliminary injunction:

- (a) The State is restrained and enjoined from taking any action to implement or enforce the Transfer Legislation.
- (b) Under Rule 65(d) of the North Carolina Rules of Civil Procedure, the State's "officers, agents, servants, employees, and attorneys, and . . . those persons in active concert or participation with them who receive actual notice in any manner of [this] order by personal service or otherwise" are likewise enjoined from taking any action to implement or enforce the Transfer Legislation.

Counsel for the Board shall serve copies of this order on the Chief Deputy Attorney General, the President Pro Tempore of the North Carolina Senate, the Speaker of the North Carolina House of Representatives, and the Superintendent of Public Instruction-Elect.

Unless the State consents to an extension of this temporary restraining order, the Board's motion for preliminary injunction shall be heard before the undersigned Superior Court Judge

~~within ten days from the date of this order, or as soon thereafter as the Court may hear this matter.~~ *Friday January 6, 2017 at 9:30 Courtroom 10C.*

So ordered the 29th day of December at 4:00 p.m.

Donald W. Stephens
The Honorable Donald W. Stephens
Senior Resident Superior Court Judge
Wake County Superior Court

WWS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served by hand-delivery to the following:

State of North Carolina
c/o Grayson G. Kelley
Chief Deputy Attorney General
North Carolina Attorney General's Office
114 W Edenton Street
Raleigh, North Carolina 27603

The Honorable Philip E. Berger
President Pro Tempore of the North Carolina Senate
Legislative Building
16 W. Jones Street, Room 2007
Raleigh, North Carolina 27601

The Honorable Timothy K. Moore
Speaker of the North Carolina House of Representatives
Legislative Building
16 W. Jones Street, Room 2304
Raleigh, North Carolina 27601

Mark Johnson
2680 Arbor Place Ct.
Winston-Salem, North Carolina 27104

This the 30th day of December, 2016.


Andrew H. Erteschik

Exhibit F

NORTH CAROLINA

WAKE COUNTY

NORTH CAROLINA STATE
BOARD OF EDUCATION,

Plaintiff,

v.

THE STATE OF NORTH CAROLINA,

Defendant.

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16-CVS-15607

**AFFIDAVIT OF
WILLIAM W. COBEY, JR.**

I, William W. Cobey, Jr., declare under penalty of perjury as follows:

1. I have personal knowledge of the matters set forth in this affidavit.
2. I currently serve as the Chairman of the North Carolina State Board of Education.

I have served in this capacity since 2013, when Governor Pat McCrory appointed me to the Board and I was confirmed by the General Assembly.

3. Prior to serving as Chairman, I served as a member of the U.S. House of Representatives, as the Deputy Secretary of the North Carolina Department of Transportation, as the Secretary of the North Carolina Department of Environment, Health and Natural Resources, and for two terms as the Chairman of the North Carolina Republican Party.

4. I hold a bachelor of arts in chemistry from Emory University, a masters in business administration from the University of Pennsylvania's Wharton School of Business, and a masters in education from the University of Pittsburgh.

5. Under Article IX, Section 4 of the North Carolina Constitution, the Board is composed of "the Lieutenant Governor, the Treasurer, and eleven members appointed by the Governor, subject to confirmation by the General Assembly in joint session." Article IX,

Section 4 requires that these Board members serve “overlapping terms of eight years.” These lengthy, overlapping terms ensures that, at all times, Board has at least a half century of combined experience supervising and administering North Carolina’s public school system and the funds provided for its support. This constitutional structure also maintains the Board’s institutional knowledge and expertise in education, enables smooth transitions between Board memberships, provides ample training opportunities for incoming members by experienced members, and insulates the Board from political cycles.

6. In addition, Article IX, Section 4 requires that eight of the Governor’s eleven appointments must be made from each of the eight educational districts. This geographic diversity ensures that the Board is representative of the people.

7. On December 14, 2016, the General Assembly introduced House Bill 17. Within 48 hours, it passed both the House of Representatives and the Senate. Three days later, on December 19, 2016, House Bill 17 was signed into law as Session Law 2016-126.

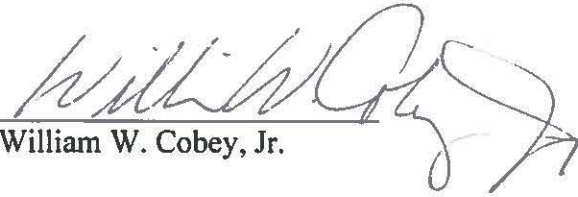
8. Session Law 2016-126 contains provisions that attempt to transfer the Board’s constitutional powers and duties to the Superintendent of Public Instruction (“SPI”). Those provisions appear in Part I, Sections 1-12, 14-16, 24-15, and 28-30 (“the Transfer Legislation”).

9. For the past 148 years, the Board has been in charge of the public school system. The Transfer Legislation attempts to strip the Board of its constitutional powers and duties, however, and makes the SPI in charge of the public school system instead. Thus, without a preliminary injunction to preserve the status quo, the Transfer Legislation would reduce a 148-year-old constitutional entity to an empty shell, and would put the entire \$10 billion public

school system under the control of a single individual. Without a preliminary injunction to preserve the status quo, the Transfer Legislation would accomplish this seismic shift overnight.

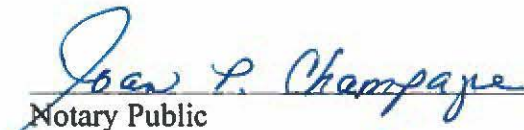
10. Furthermore, without a preliminary injunction to preserve the status quo, the SPI would be immediately empowered to take drastic actions that could not be undone. For example, the SPI would immediately be empowered to unilaterally hire and fire public school system employees, fire members of the Board's staff, determine whether certain public school system positions should be exempt from state personnel laws, execute new contracts for the public school system, and jeopardize the Board's ability to manage more than 150 existing contracts for tens of millions of dollars. These actions would be impossible to undo after the fact, even if this declaratory judgment action were ultimately resolved in favor of the Board.

11. I am unaware of any non-political justifications for dismantling North Carolina's 148-year-old constitutional structure for managing public education. Under Article I, Section 15 of the North Carolina Constitution, "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." I personally believe that guarding and maintaining that right should always be above politics.


William W. Cobey, Jr.

WAKE COUNTY, NORTH CAROLINA

Sworn to and subscribed before me this the 4 day of January, 2017.


Notary Public

My commission expires: Jan 9, 2018

[SEAL]

